

(23,923)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 288.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF
IN ERROR,

vs.

SONMAN SHAFT COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, Appellant, and Sonman Shaft Coal Company, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the

2 Constitution or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL]

W. W. CRAIG,
*Clerk of the District Court of the United States,
Eastern District of Pennsylvania.*

Allowed by

D. NEWLIN FELL,
*Chief Justice of the Supreme Court of the
State of Pennsylvania.*

3 Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The Title Guaranty and Surety Company, as sureties, are held and firmly bound unto the Sonman Shaft Coal Company, in the full and just sum of Three hundred and twenty-five thousand (325,000), dollars, to be paid to the said Sonman Shaft Coal Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of July in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, The Pennsylvania Railroad Company, appellant, and the Sonman Shaft Coal Company, appellee, a judgment was rendered against the said The Pennsylvania Railroad Company and the said The Pennsylvania Railroad Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sonman Shaft Coal Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

4 THE PENNSYLVANIA RAILROAD COMPANY,

By GEO. D. DIXON, *Vice-President.* [SEAL.]

Attest:

LEWIS NEILSON, *Secretary.*

THE TITLE GUARANTY & SURETY COMPANY,

By HARRIS J. LATTA, [SEAL.]
Resident Vice-President.

Attest:

WILLIAM RARICH,
Resident Assistant Secretary.

Sealed and delivered in presence of—

JOS. RICHARDSON,
As to G. D. D.

GEO. F. NORTON,
As to L. N.

Approved by—

D. NEWLIN FELL,
Chief Justice Supreme Court of Pennsylvania.

5 UNITED STATES OF AMERICA, ss:

To Sonman Shaft Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania.]

D. NEWLIN FELL,

Chief Justice of the Supreme Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this third day of July, in the year of our Lord one thousand nine hundred and thirteen, personally appeared James P. O'Laughlin before me, the subscriber, Prothonotary and Clerk of the Court of Common — of Clearfield County, Pennsylvania, and makes oath that he delivered a true copy of the within citation to Alfred M. Liveright of the attorneys of record for the said Sonman Shaft Coal Company and read the original to said Liveright.

JAMES P. O'LAUGHLIN.

Sworn to and subscribed the 3rd day of July, A. D. 1913.

[Seal Court of Common Pleas, Clearfield County.]

JOHN H. MOORE,

Proth'y & Clerk of the Court.

6 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 30.

SONMAN SHAFT COAL COMPANY

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania:

The Pennsylvania Railroad Company, the appellant in the above entitled action, respectfully shows:

The plaintiff, a shipper of bituminous coal over the lines of your

petitioner, obtained a judgment in the Court below because of the alleged failure of your petitioner to furnish it with all the cars which it claimed it could have used for the shipment of its coal.

The plaintiff shipped to points both within and without the State of Pennsylvania, and the additional coal which it claimed it would have shipped had cars therefor been available would have been shipped to points both within and without the State.

Your petitioner contended that the action was not cognizable by the State Courts of Pennsylvania because of the fact that the Acts of Congress, known as the "Interstate Commerce Acts," had defined and prescribed the extent of the obligation to which it was subject in respect to the furnishing of cars to shippers, and that consequently if there had been any actionable default on its part in respect to the plaintiff's demands for cars, the remedies available to the plaintiff were those, and those only, which were defined and prescribed in the said Interstate Commerce Acts, and that under the provisions of Section 9 of said Act any cause of action which
7 the plaintiff might have was cognizable either by the Commission constituted in and by the said Interstate Commerce Acts, known as the "Interstate Commerce Commission," or by the Federal Courts, and that consequently the State Courts of Pennsylvania were not empowered to entertain nor to exercise jurisdiction over actions of the character instituted by the plaintiff herein.

Your petitioner, as a defence to said action, offered to prove, as the Record in the case will establish, that continuously throughout the period of the action a large number of its cars were off its own lines and on the lines of other carriers, which cars had been delivered to these other carriers loaded with coal consigned to points outside the State of Pennsylvania, and your petitioner contended that this evidence was relevant and material because if the fact offered to be proved were established, your petitioner would be relieved from liability to the plaintiff for failure to deliver cars to it to the extent to which this failure was the result of compliance on its part with the obligation imposed upon it by the said Interstate Commerce Acts to allow its cars consigned to points outside the State of Pennsylvania to go off its own lines and on to the lines of other carriers. Your petitioner's offer to prove such fact was overruled, and testimony to the effect indicated was excluded by the lower Court, and its action in this respect has been affirmed by the Supreme Court of Pennsylvania.

As a further defence to the action your petitioner contended that it had an adequate supply of cars for its shippers as a whole—and the jury to which this issue was submitted by the Court below so found—and that its failure to deliver a larger number of cars to the plaintiff than had been delivered to it was due to, and resulted from, the legal compulsion that your petitioner was under by virtue of the provisions of the said Interstate Commerce Acts to distribute the cars which it had ratably among its shippers, and that it was not responsible to the plaintiff because the cars allotted to it as the result of such distribution were not equal in number to the cars which the plaintiff claimed it could have used. This contention,

8 however, was overruled by the Court below, and its action in this respect has been approved and affirmed by the Supreme Court of Pennsylvania.

As a result of the overruling of the contentions thus advanced upon behalf of your petitioner, a final judgment has been entered against it in a case in which the decisions of both the lower Court and the Supreme Court of Pennsylvania have been against a right, privilege or immunity claimed and asserted by your petitioner under the Constitution and Statutes of the United States, and in favor of an authority exercised under and pursuant to a law of the State of Pennsylvania, notwithstanding the contention of your petitioner that such authority was not properly exercisable on the ground of its repugnancy to the Constitution and laws of the United States.

Your petitioner, being desirous of having such final judgment reviewed by the Supreme Court of the United States, prays that a writ of error for this purpose may be allowed.

And it will ever pray, etc.

[Seal of the Pennsylvania Railroad Company, Incorporated 1846.]

THE PENNSYLVANIA RAILROAD
COMPANY,

By GEO. D. DIXON,

Vice-President.

Attest:

LEWIS NEILSON, *Secretary.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Company, the petitioner herein, and that the facts contained and set forth in the above and foregoing petition are true to the best of his knowledge, information and belief.

LEWIS NEILSON.

Sworn and subscribed before me this first day of July, 1913.

[Seal of Henry E. Cain, Notary Public, Philadelphia, Pa.]

HENRY E. CAIN,

Notary Public.

Commission expires February 21, 1915.

[Endorsed:] No. 30. January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Sonman Shaft Coal Company vs. Pennsylvania Railroad Company. Petition for allowance of writ of error to the Supreme Court of the United States. Francis I. Gowen.

9 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
SONMAN SHAFT COAL COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specifications of Error.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"1. The Court below erred in charging the jury as follows:

"It is first contended on behalf of the defendant that the said court does not have jurisdiction, for the reason that the United States Congress has conferred entire jurisdiction upon the Federal Courts or other tribunals established by Congress, and that hence there is no right of recovery for any failure of duty in furnishing car facilities in the State Courts, of which this is one. This contention, as you have noticed, we have overruled.' "

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"2. The Court below erred in charging the jury as follows:

"It is again further contended that only such portion of the coal which may have been or was intended ultimately to be delivered within the State of Pennsylvania could be recovered in this action. With this contention we also disagree with the learned Counsel and hold that where coal is sold f. o. b. cars at the mines it is a Pennsylvania delivery and that the right of action is
10 in the State Courts for failure of a common carrier to perform its common law or statutory duty.' "

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"3. The Court below erred in affirming the plaintiff's sixth point, this point and the answer thereto being as follows:

"(6). If the Jury find that the plaintiff is entitled to recover from the defendant, it is entitled to a verdict for whatever damages it appears from the evidence it sustained by reason of the wrongful acts of the defendant, upon all coal which was mined and sold f. o. b. cars at its mines between April 1, 1903 and April, 1907, or which in that period could and would have been mined and sold f. o. b. cars at Sonman mine, but for the wrongful acts of the defendant.' "

"Answer: 'Affirmed.' "

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"4. The Court below erred in refusing to charge as requested in

the defendant's fifteenth point, this point and the answer thereto being as follows:

"15. The plaintiff's right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, to points inside the State of Pennsylvania and there can be no recovery in this action for damages, if any, resulting from the plaintiff's inability to sell coal f. o. b. cars at its mines consigned by it to points outside the State of Pennsylvania."

"Answer: 'That point is refused.'"

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"5. The Court below erred in charging the jury as follows:

"It is further contended on the part of the defendant that the rule of law to which we have heretofore referred which requires a common carrier in ordinary times and under ordinary conditions to have and furnish an adequate and sufficient supply of cars, does not mean that the common carrier is bound to furnish just the number of cars demanded or for which requisition is made by an individual shipper, as was this plaintiff. It is contended in its behalf that the defendant, as a common carrier, had a sufficient and adequate supply of cars for ordinary times in the coal trade as a whole, but that because, taking the whole number of shippers in the region, the demand far exceeded the supply, and, as they infer, would exceed the necessities of the trade, they were obliged to, and in fact did, apportion or allot their coal cars according to a pro rata schedule based on the ratings of the several mines. With this contention we do not agree. The result of that contention, worked out to its logical conclusion, would lead to the undue and unreasonable discrimination expressly forbidden."

11 6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"7. The Court below erred in refusing to charge the jury as requested in the defendant's fifth point, this point and the answer thereto being as follows:

"5. The plaintiff can, in no event, recover for an alleged shortage in the number of cars furnished it beyond what its pro rata share of cars would have been under the established system of distribution."

"Answer: 'That point is refused for the reason that there is no testimony to show that there was any abnormal condition in the coal business entitling the defendant to refuse a bona fide demand for cars.'"

7. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"8. The Court below erred in refusing to charge the jury as requested in the defendant's twelfth point, this point and the answer thereto being as follows:

"12. The evidence does not disclose any general shortage of equipment on the part of the defendant, and, accordingly, the

plaintiff cannot recover for the failure of the defendant to furnish cars in excess of the plaintiff's allottable share of the equipment of the defendant available for distribution under the defendant's system of distribution in effect during the period of the action."

"Answer: 'That point is refused.'"

8. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"9. The Court below erred in refusing to charge the jury as requested in the defendant's second point, this point being as follows:

"2. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should, therefore, be for the defendant."

9. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"10. The Court below erred in sustaining the objection made upon behalf of the plaintiff to the defendant's offer of testimony which is embodied in the following offer made by its counsel:

"The defendant offers to prove by the witness on the stand that during all of the period of this action the defendant had in effect on and for shipments of bituminous coal through

12 routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

"Mr. LIVERIGHT: Objected to, first, as immaterial and irrelevant, second, as being no answer to the complaint made in this case or the testimony adduced in this case; and third, as being entirely inconsistent with their own testimony that they have already put in."

"The COURT: Objection sustained, evidence excluded, exception noted and bill sealed for defendant."

10. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"11. The Court below erred in overruling the motion of the defendant to dismiss the action for want of jurisdiction to entertain the same."

11. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"12. The Court below erred in overruling the motion of the defendant for judgment non obstante veredicto."

12. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"13. The Court below erred in entering judgment on the verdict in favor of the plaintiff."

FRANCIS I. GOWEN,
Attorney for Plaintiff in Error.
H. W. B.

[Endorsed:] No. —. — Term, 1913. In the Supreme Court of the United States. Pennsylvania Railroad Company, Plaintiff in Error, vs. Sonman Shaft Coal Company, Defendant in Error. In Error to the Supreme Court of Pennsylvania. Specifications of Error. Francis I. Gowen.

13 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 30.

SONMAN SHAFT COAL COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Upon the representation of counsel it appearing that the Clerk of this Court will not be able to prepare and complete the Transcript of Record in this case within the time limited in the citation, it is hereby this — day of July, 1913, ordered that the time for filing said Transcript of Record in the Supreme Court of the United States be, and the same is, hereby extended until the fifteenth day of October, 1913.

D. NEWLIN FELL.

14 C. P., Clearfield County, May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement.

The Sonman Shaft Coal Company, the plaintiff in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has suffered because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:

First. That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of

mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April, 1903, and since that time to the date of the bringing of this suit.

Second. That the Pennsylvania Railroad Company, the defendant, is the owner of and controls a main line and branch line of railroad extending from points and places in Cambria County, Pennsylvania, and as far West as Pittsburg, Pa., and as far East as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a "common carrier" and a "public highway," and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

Third. The plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from the bituminous coal regions tributary as aforesaid to its main line and branches in the Counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market to points and places within the State of Pennsylvania a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit. damage to the sum of Two Hundred Thousand (\$200,000) Dollars.

Fourth. That under and by virtue of the charter of the defendant company, as well as by the Constitution and Laws

of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations mining, producing and shipping bituminous coal over its main line and branches; and especially was the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the Counties of Blair, Cambria, Clearfield, Westmoreland, and Indiana; yet disregarding its duty and legal obligations it did, between the 1st of April, 1903, and the 1st of April, 1908, unduly and unreasonably give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the Counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially named, and against the plaintiff. And the plaintiff further in this behalf avers that the

17 defendant company did unduly and unreasonably discriminate against it and in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number of coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, and by the transfer of said coal cars from the defendant's ownership and control, did lessen the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to markets, and to points and places within the State of Pennsylvania, and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and the 1st of April, 1908, cause great damage to be done to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand (\$200,000) Dollars.

Fifth. The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason

of the failure of the defendant company to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade, to have the product of its mines carried and transported to the market at points and places within the State of Pennsylvania, it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand (\$90,000) Dollars, and that subsequently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand (\$60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand (\$30,000) Dollars, which amount plaintiff claims to recover

18 also in this action, in addition to the amount of damages set forth above arising from the undue and unreasonable discrimination of the defendant company in the distribution of coal cars.

Sixth. Plaintiff further avers that because of the inadequate and insufficient supply of coal cars by the defendant company for the transportation of product of plaintiff's mines, and by reason of the undue and unreasonable discrimination on the part of the defendant in favor of other persons, firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mine running, and to keep its organization and force of men together, and to prevent loss from the fixed charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand (\$10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as hereinbefore stated.

(Signed)

KREBS & LIVERIGHT,
Attorneys for Pl'ffs.

Filed Nov. 18, 1909. Roll B. Thompson, Prothonotary.

19

C. P., Clearfield County, May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Amended Statement.

The Sonman Shaft Coal Company, the plaintiff, in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has suffered

because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:

First. That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April 1903, and since that time to the date of the bringing of this suit.

Second. That the Pennsylvania Railroad Company, the defendant, is the owner of and controls a main line and branch line of railroad extending from points and places in Cambria County, Pennsylvania, and as far west as Pittsburgh, Pa., and as far East as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a "common carrier" and a "public highway," and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

Third. The plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from the bituminous coal regions tributary as aforesaid to its main line and branches in the Counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal, it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance of its

duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit, damage to the sum of Two Hundred Thousand Dollars (\$200,000.00).

Fourth. That under and by virtue of the charter of the defendant company, as well as by the Constitution and laws of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations mining, producing and shipping bituminous coal over its main line and branches; and especially was the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the Counties of Blair, Cambria, Clearfield, Westmoreland and Indiana; yet disregarding its duty and legal obligations it did, between the 1st of April, 1903, and the 1st of April, 1908, unduly and unreasonably give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the Counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing, and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially named, and against the plaintiff. The plaintiff further in this behalf avers that the defendant company did unduly and unreasonably discriminate against it and in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number of coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, and by the transfer of said coal cars from the defendant's ownership and control, did lessen the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to market, and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and 1st of April, 1908, cause great damage to be done

to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand (200,000) Dollars.

Fifth. The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason of the failure of the defendant company to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade, to have the product of its mines carried and transported to the market, it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand (90,000) Dollars, and that subsequently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand (60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand (30,000) Dollars, which amount plaintiff claims to recover also in this action, in addition to the amount of damages set forth above arising from the undue and unreasonable discrimination of the defendant company in the distribution of coal cars.

Sixth. Plaintiff further avers that because of the inadequate and insufficient supply of coal cars by the defendant company for the transportation of the product of plaintiff's mines, and by
 23 reason of the undue and unreasonable discrimination on the part of the defendant in favor of other persons, firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mines running, and to keep its organization and force of men together, and to prevent loss from the fixed charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand (10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as hereinbefore stated.

(Signed)

KREBS & LIVERIGHT,

Attorneys for Plaintiffs.

Now September 27th, 1911, the defendant objects to the proposed amendment to the third, fourth and fifth paragraphs of Plaintiff's Statement as not being authorized by the statutes of amendment and as introducing another and different cause of action and as introducing cause of action not within the jurisdiction of this court.

(Signed)

MURRAY & O'LAUGHLIN,

Attorneys for Defendant.

Filed Sept. 28, 1911. Roll B. Thompson, Prothonotary.

Now Sept. 27th, 1911 amendment allowed and directed to be filed by the Prothonotary at request of counsel for defendant exception is noted for defendant and bill sealed.

By the Court,

ALLISON A. SMITH, P. J.

SONMAN SHAFT COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion to Dismiss Action for Want of Jurisdiction.

The Pennsylvania Railroad Company, the Defendant in the above entitled action, respectfully moves the Court to dismiss the same for the following reasons:

1. It is a corporation organized and existing under the Laws of the State of Pennsylvania, owning and operating a line of railroad in that State and also in the States of New York and New Jersey, and is engaged in the transportation of passengers and freight between points in said States, and is, therefore, subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto.

2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments.

3. In furnishing and distributing during the period of the action among shippers desirous of using the same cars for the shipment of coal, it made no distinction between shipments intended for or consigned to points or destinations outside the State of Pennsylvania and those within that State, and allowed the shippers to whom the cars were delivered to determine and control the destination thereof without regard to the consideration whether such destinations were within or without the said State.

4. The Acts to regulate commerce, as your petitioner is advised, determine and define the extent and character of the obligation which your petitioner was under in respect to furnishing and distributing its coal car equipment during the period of the action, and by reason of the paramount authority possessed by the Congress of the United States, the provisions of the said Acts are controlling and the remedies for violation thereof prescribed therein are exclusive of all others, and as the tribunals which are designated and

prescribed by said Acts as those in which actions of the character of the present one shall be maintained are the Courts of the United States and the Interstate Commerce Commission, jurisdiction to entertain the present action does not exist in this Court.

5. Wherefore, your petitioner, showing that this Court is without jurisdiction to entertain the present action, prays that an order may be made dismissing the same.

THE PENNSYLVANIA RAILROAD
COMPANY,

(Signed) By W. W. ATTERBURY, *Vice-President.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

W. W. Atterbury, being duly sworn, according to law, deposes and says: That he is the Vice President of the Pennsylvania Railroad Company, the defendant in the above entitled action. That the facts set forth in the above motion are true, and that the
26 said motion has not been made for the purpose of delay.
(Signed) W. W. ATTERBURY.

Sworn and subscribed before me this 9th day of February, A. D. 1912.

HENRY E. CAIN, *Notary Public.*

Commission expires February 21, 1915.

27 C. P., Clearfield County, May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Now February 19, 1912, motion to dismiss is overruled. Exception noted for defendant.
By the Court.

ALLISON O. SMITH, *P. J.*

28

TESTIMONY.

Vance C. McCormick.

VANCE C. McCORMICK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Harrisburg, Pennsylvania.

Q. What is your connection with the Sonman Shaft Coal Company and what has it been since 1903 on?

A. Since 1903 on I was treasurer of the Sonman Shaft Coal Company, since April 1st, 1903, and was active in the handling of its affairs from Harrisburg.

Q. What end of the business did you particularly look after?

A. I particularly looked after the selling end.

Q. Did you go to the mine occasionally?

A. I went out to the mines frequently. I was in constant communication with Mr. Saxman, who at that time was Manager of the mines.

Q. Who constituted the corporation?

A. Mr. Cameron and Mr. Saxman and myself originally started the organization. We leased the property from the Cambria Mining & Manufacturing Company in 1899, April 29th I think the lease is, and then we had also a few other stockholders, very small holders. We owned the bulk of the stock and we were the directors of the Company, and Mr. Cameron and myself in the same office in Harrisburg looked after the selling end of it. Mr. Saxman operated the mine.

Q. Do you continue as treasurer up to this time?

A. No, I resigned I think about 1908, I am not sure of the exact date.

Q. You were treasurer during the entire period of the action?

A. I think I was treasurer during the entire period of the action.

Q. In what way did you look after the selling end?

29 A. Well I sold practically most of the coal. I don't say I sold all of it. I think sometimes Mr. Saxman got some of the orders, but at Harrisburg, Mr. Cameron, who was President of the Company, and I.

Q. What trade name does the coal bear?

A. It is called the Sonman coal. It was situated about a mile from Portage on the Pennsylvania, one mile east.

Q. East of where?

A. Portage.

Q. State during the period of the action what kind of railroad car supply the Sonman Shaft Coal Company had at its Sonman mine?

A. Fearful.

Q. Did you make any effort to remedy it?

A. Continual efforts to remedy it.

Q. How?

A. By personal calls, by telephone calls and by correspondence, every way possible.

Q. Upon whom did you call?

A. Well we called upon from the President down. President Cassatt and Vice President Pugh.

Q. Are these your calls?

A. I personally, myself, called upon President Cassatt, Vice President Pugh, Vice President Prevost, General Manager Atterbury and Mr. Trump. And Mr. Cameron also made frequent calls. That was in addition to the frequent requests from the mines, which were made additionally.

Q. Did you go in company with Mr. Cameron to visit any of these officers?

A. Yes, a number of times. I remember some special occasions very vivid in my mind we called on Mr. Cassatt.

Q. When?

A. In 1903.

30 Q. What month?

A. It was some time in April. Mr. Cameron and I were at a lunch party where Mr. Cassatt was present, at Mr. Cameron's father-, and we told Mr. Cassatt of some correspondence we had with Mr. Creighton and about the bad treatment we were receiving and we were being discriminated against by the Railroad Company and he said he didn't see how it was possible at that time because there was a fair movement of cars, and we told him we would send our correspondence with Mr. Creighton and it showed we were getting about one-quarter of our rating, and we told Mr. Cassatt we thought it was impossible all the mines on the Pennsylvania were only receiving one-quarter of their supply, and he told us to send in the figures in this letter, which we did, and we afterwards followed that up with a personal interview in his office.

Q. Where?

A. In Philadelphia.

Q. What passed between you there?

A. At that time we discussed the situation. As I remember he called in one of the men with records and so on to try to show us we were getting—

Mr. O'LAUGHLIN: We object to all the testimony with relation to things that transpired between this witness and officers of the Railroad Company and move it be stricken out, for the reason the Railroad Company is not bound by the things done by the Railroad officers other than the Board of Directors.

The COURT: Objection overruled, evidence admitted, exception noted for Defendant and bill sealed.

By Mr. LIVERIGHT:

Q. Just go on?

31 A. We referred to this correspondence and we called Mr. Cassatt's attention to the fact we had received about a quarter of our rating and that we didn't think it possible that the Pennsylvania Railroad could carry on business by giving only all the mines a quarter of their rating and we discussed this discrimination, as we claimed, with him. During that conversation we told him we heard about the thousand cars that had been sold to Berwind-White and we complained about that as a great injustice to the other shippers and that it was not fair, and he told Mr. Cameron and myself that if they had not sold the cars to them they would have given them the cars any way, the contention being they were big shippers and had big contracts with steamships and electric light companies and that it was absolutely necessary to protect those consumers. We argued if we had all the

cars we needed we would be big shippers and we could also handle a business of that kind in New York Harbor and steamship business.

Q. Does that about cover the interview?

A. That about covered the interview.

Q. Did you get any relief then?

A. I think for about a month we got probably more cars continuously, although I am not sure about that. I would have to confirm that by the records. We got a temporary relief, not what we should have had, but we got a little better supply of cars.

Q. For the entire month, you say?

A. It wasn't very long I remember, and I wouldn't want to state that positively until I had investigated the records further.

Q. What was the nature of your interview with Mr. Prevost?

A. Well I also went to Mr. Prevost and my recollection of that interview is it was pretty much along similar lines. Mr. Prevost I remember, defended the policy of the Railroad Company in giving the big shippers the cars because they had to take care of these electric light plants, gas companies and concerns of that sort that had to have the coal, and we argued against that policy, we was entitled to it, and after some of these visits we did have temporary relief. I mean not what we thought we ought to get, but we got a little better car supplies for a short time.

Q. Then what arose after that?

A. Then it would drift back into the same old rut, and we averaged in 1903 eight cars a day I think.

Mr. O'LAUGHLIN: We object to the average in 1903 and from any other part than from April 1st.

By Mr. LIVERIGHT:

Q. From April 1st?

A. We averaged eight cars a day from April 1st, 1903. I don't know whether it ran over to April 1st, 1904.

Q. When you talk about coal years what dates do you cover as a year?

A. From April 1st usually to the succeeding April 1st.

Q. When you say your car supply was eight cars a day for 1903 do you mean from April 1st, 1903, to April 1st, 1904?

A. Yes sir.

Q. What was your capacity to produce coal at that time?

A. We equipped the mine to mine 1,000 tons a day and we had no question in our mind but that we could have done it.

Q. What was your per diem rating as granted you by the Railroad Company?

A. For April of 1903 it was 35 cars a day. The next month they changed the system to tonnage and I think it was 750 tons a day.

Q. Do you know how long that continued?

A. I think that continued until the end of the period.

33 By the COURT:

Q. That is in May it was changed?

A. I think the first of May it was changed. We have a letter from Mr. Creighton, I think Mr. Creighton stating that rating. I was advised of that rating by our superintendent at that time.

By Mr. LIVERIGHT:

Q. How many tons would eight cars amount to?

A. Well those are 25 ton cars I think.

Q. 25 net or gross tons?

A. We figured always gross tons.

Q. Do you know how the Railroad Company figures?

A. I do not

Q. All you know is there were eight cars?

A. Eight cars.

Q. When you interviewed Mr. Prevost and Mr. Cassatt in 1903, state whether or not either of them entered any denial of these charges you made against the Railroad Company?

Mr. O'LAUGHLIN: We object to that question as being incompetent, irrelevant and immaterial. It is either true or false whether they denied it or didn't deny it.

The COURT: He has practically given the conversation.

By Mr. COLE:

Q. Did they make any other denial except what you stated?

Mr. O'LAUGHLIN: We still object to the question as being incompetent, irrelevant and immaterial.

The COURT: He has a right to give the entire conversation.

34 Mr. LIVERIGHT: We withdraw the question.

Mr. COLE: We ask him if they made any other admission?

The COURT: That isn't competent, because that is a conclusion rather than a fact.

Mr. LIVERIGHT: At this stage Plaintiff's Counsel having served notices on Defendant to produce certain letters, which notices was served 7th of February, 1912, calls on defendant to inquire whether they are on hand.

Mr. O'LAUGHLIN: Defendant's Counsel does not know whether they are at hand or are not at hand. There are a great many papers at hand and sitting here we cannot say.

Mr. LIVERIGHT: The notices are offered in evidence requiring them to produce. (Marked Plaintiff's Exhibits Nos. 1 and 2.)

(Copy of Plaintiff's Exhibit No. 1.)

In the Court of Common Pleas of Clearfield County, Pa., May Term,
1909.

No. 322.

SONMAN SHAFT COAL COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

"Messrs. Murray & O'Laughlin, Attorneys for Defendant:

You are hereby notified and required to produce at the trial of the above stated cause listed for February Term, 1912, the following letters and telegrams in relation to car supply from
35 the Sonman Shaft Coal Co. to the Pennsylvania Railroad Co. by and to their respective officers.

Letter, Sept. 2, 1902, J. M. Cameron, Pres. to J. M. Wallis, Gen. Supt.

Letter, Sept. 8, 1902, J. M. Cameron, Pres. to J. M. Wallis, Gen. Supt.

Letters, Sept. 12, 1902, J. M. Cameron, Pres. to J. M. Wallis, Gen. Supt.

Letter, Oct. 30, 1902, Vance C. McCormick, Treas. to J. M. Wallis, Gen. Supt.

Letter, Nov. 4, 1902, Vance C. McCormick, Treas. to J. M. Wallis, Gen. Supt.

Telegram, Jan. 16, 1903, Vance C. McCormick to G. W. Creighton.

Letter, Jan. 21, 1903, J. M. Cameron, Pres. to G. W. Creighton, General Superintendent.

Telegram, Jan. 31, 1903, Vance C. McCormick to G. W. Creighton.

Telegram, Feb. 10, 1903, Vance C. McCormick to G. W. Creighton.

Telegram, Feb. 11, 1903, Vance C. McCormick to G. W. Creighton.

Telegram, Feb. 24, 1903, Vance C. McCormick to G. W. Creighton.

Telegram, Feb. 25, 1903, Vance C. McCormick to G. W. Creighton.

Letter, Apr. 13, 1903, Vance C. McCormick, Treas. to G. W. Creighton, Gen. Supt. enclosing abstract of letter of Supt. of the Sonman Shaft Coal Co.

Letter, Apr. 20, 1903, J. M. Cameron, Pres. to G. W. Creighton, Gen. Supt.

Letter, Apr. 25, 1903, Vance C. McCormick to A. J. Cassatt, Pres. in re cars for loading vessel.

36 Letter, Apr. 28, 1903, Sonman Shaft Coal Co. to G. W. Creighton, Gen. Supt.

Letter, May 1, 1903, J. M. Cameron, Pres. to G. W. Creighton.

Letter, May 8, 1903, Vance C. McCormick to A. J. Cassatt.

Letter May 13, 1903, Vance C. McCormick to A. J. Cassatt, Pres.

Letter, June 29, 1903, Vance C. McCormick, Treas. to R. M. Patterson, Supt. of Freight Transportation.

Letter, Feb. 1, 1904, Vance C. McCormick to G. W. Creighton, Gen. Supt.

Letter, Feb. 29, 1904, Vance C. McCormick, Sec'y and Treas. to M. Trump, acting Gen. Supt.

Letter, Mar. 29, 1904, Vance C. McCormick, Treas. to M. Trump, acting Gen. Supt.

Letter, June 18, 1903, Vance C. McCormick, Treas. to W. W. Atterbury, Gen. Manager.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Served on us by copy this 7th day of February, A. D. 1912.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant."

37 (Copy of Plaintiff's Exhibit No. 2.)

In the Court of Common Pleas of Clearfield County, Pa., May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

"Messrs. Murray & O'Laughlin, Attorneys for Defendant.

GENTLEMEN: You are hereby notified and required to produce at the trial of the above stated case set for February Term, 1912, all Letters, Telegrams and written requests for coal cars, and all telegrams, letters and writings containing complaints concerning the distribution of cars to the mines of the above named plaintiff, which were at any time between the 1st day of September, 1902, and the 31st day of March, 1908, addressed to or received by J. M. Wallis, Gen. Supt., G. W. Creighton, Gen. Supt., A. J. Cassatt, Pres., R. M. Patterson, Supt. of Freight transportation, Michael Trump, Gen. Supt. of Transportation or any other officer or agent of the Pennsylvania Railroad Co.; particularly any such letters, telegrams, requests or writings from the plaintiff by J. M. Cameron, Vance C. McCormick, James B. Neale or either of them, but not restricting such production to letters, telegrams or writings signed by said three persons.

You are also notified and required to produce the daily distribution sheets showing the rating of all mines on the Mountain and South Fork & Scalp Level Divisions of the Defendant's railroad and the number of cars distributed each day to the various mines thereon from the 1st day of April 1903 to the 31st day of March 1908.

38 You are also notified and required to produce any and all telegraphic or other orders from any superior to any officer of equal

rank, or any inferior officer or employee of the defendant between April 1, 1903 and March 31, 1908, relating to the distribution and supply of cars to or for the Berwin-White Coal Mining Co., the Keystone Coal & Coke Co., the Alton Co., the Columbia Coal Mining Co. or either of them. You are also notified and required to produce any and all correspondence and copies thereof between the defendant and the Berwind-White Coal Mining Co., the Keystone Coal & Coke Co. or either of them relating to the transfer of coal cars in course of construction, constructed or to be constructed, from defendant to Berwind-White Coal Mining Co. or Keystone Coal & Coke Co.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Served on us by copy this 7th day of Feb., A. D. 1912.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant."

Q. I hand you copy of a letter bearing date April 13, 1903, addressed to Mr. G. W. Creighton, and ask you whether that is a copy of a letter forwarded by you to the addressee?

A. It is.

(Marked Plaintiff's Exhibit No. 3.)

Q. Did that letter contain the enclosure, a copy of which is in your hand now?

A. It did.

Q. I hand you letter bearing date April 25, 1903, addressed to Mr. A. J. Cassatt, President P. R. R. Co., Philadelphia, Pa.
39 and ask you whether that is a true copy of the original forwarded by you to the addressee therein?

A. It is.

(Marked Plaintiff's Exhibit No. 4.)

Q. I hand you letter dated April 28th, 1903, addressed to Mr. G. W. Creighton, General Superintendent P. R. R., Altoona, Pa., and ask you whether that is a true copy of the original addressed to Mr. Creighton?

A. Yes sir, that is dictated by me.

(Marked Plaintiff's Exhibit No. 5.)

Q. Letter of May 8th, 1903, addressed to Mr. A. J. Cassatt, President of the P. R. R. Co. handed witness. Is that a true copy of the original?

A. That is.

(Marked Plaintiff's Exhibit No. 6.)

Q. By whom was it written or dictated?

A. I dictated the letter to Mr. Anvers, my stenographer.

Q. Letter of May 13, 1903, handed witness. Is that a true copy of a letter addressed to Mr. A. J. Cassatt and forwarded from the office of the Sonman Shaft Coal Company?

A. I think it is a true copy. It spells Mr. Atterbury's name improperly. It has got Waterbury instead of Atterbury.

(Marked Plaintiff's Exhibit No. 7.)

Q. Letter of June 18, 1903, handed witness and asked whether that is a true copy of the original addressed to W. W. Atterbury?

A. That is the same error was made in copying it and putting it W; instead of Atterbury they have got Waterbury.

(Marked Plaintiff's Exhibit No. 8.)

40 Q. I hand you a letter dated June 29, 1913, addressed to R. M. Patterson, Superintendent of Freight Transportation, and ask whether that is a true copy from your Company to the addressee?

A. It is.

(Marked Plaintiff's Exhibit No. 9.)

Q. Letter dated February 1st, 1904, addressed to Mr. G. W. Creighton, General Superintendent P. R. R. handed witness. Is that a true copy of letter addressed to Mr. Creighton by your Company?

A. Yes sir, it is.

(Marked Plaintiff's Exhibit No. 10.)

Q. Letter dated February 4, 1904, addressed to G. W. Creighton, General Superintendent P. R. R. handed witness. Is that a true copy of a letter from your Company to the addressee?

A. I dictated this letter to Mr. Creighton.

Mr. O'LAUGHLIN: That is not on the notices.

Mr. LIVERIGHT: If the defendant has the letter of February 4, 1904, to which the attention of the witness was just called, it is asked to produce the same. For the present we will withhold the letter and will ask the defendant to make search for same, and if he does not find it we will offer the copy tomorrow.

Q. I hand you letter of February 29th, 1904, addressed to M. Trump, acting General Superintendent P. R. R. and ask you whether that is a true copy of the original?

A. Yes sir, I dictated that letter.

(Marked Plaintiff's Exhibit No. 11.)

41 Q. Letter of March 29, 1904, addressed to M. Trump, acting General Superintendent P. R. R. handed witness. Is that a copy of the original emanating from your office?

A. Yes.

(Marked Plaintiff's Exhibit No. 12.)

Q. Letter of October 5th, 1905, addressed to Mr. A. W. Gibbs, General Superintendent of Motive Power P. R. R. Co., Altoona, Pa., handed the witness. Is that a true copy of the original emanating from your office and addressed to Mr. Gibbs?

A. It is.

(Plaintiff's Exhibit No. 13.)

Q. I hand you letter on the letter head of Pennsylvania Railroad Company, bearing date October 4, 1905, signed by A. W. Gibbs, Superintendent of Motive Power, and ask you whether that is the original received by your Company from the defendant?

A. It is.

(Marked Plaintiff's Exhibit No. 14.)

Q. I hand you letter bearing date October 7th, 1905, addressed to A. W. Gibbs, Superintendent Motive Power, and ask whether that is a copy of the original emanating from your office?

A. It is.

(Marked Plaintiff's Exhibit No. 15.)

Q. Witness handed telegram, dated Altoona, October 9, 1905, signed A. G. Gibbs in typewriter print. Is that the original telegram received by you under that date?

A. I think that is the original.

(Marked Plaintiff's Exhibit No. 16.)

Q. I hand you letter under date of October 18, 1905, on letter head of Pennsylvania Railroad, signed A. W. Gibbs, General Superintendent of Motive Power, and ask you whether that is
42 the original received by your Company?

A. It is.

(Marked Plaintiff's Exhibit No. 17.)

Q. I hand you letter dated October 19, 1905, addressed to A. W. Gibbs, General Superintendent Motive Power, and inquire whether that is a true copy of the original from your office?

A. It is.

(Plaintiff's Exhibit No. 18.)

Q. I hand you letter dated February 3rd, 1904, on letter head of Pennsylvania Railroad Company, signed G. W. Creighton, General Superintendent, and ask whether that is the original received by you as treasurer of the Plaintiff Company?

A. Yes.

(Marked Plaintiff's Exhibit No. 19.)

Plaintiff offers Exhibits Nos. 3 to 19 inclusive, identified by the witness on the stand.

By Mr. O'LAUGHLIN:

Q. Mr. McCormick, is this a carbon or impression copy of the letter addressed to somebody in the railroad service?

A. I don't know whether this is the original carbon copy of the letter addressed.

Q. To whom was it addressed?

A. This is a copy of a letter we received from our superintendent, which was sent to Mr. Creighton I think. I have the letter which that was sent with.

Mr. O'LAUGHLIN: Objection is made to the offering of the ap-

pendix to the letter of the witness, which is Exhibit No. 3; in so far
as it relates or may be interpreted to relate to a period other
43 than that in the action. Particular reference is made to the
last sentence in paragraph one and to paragraph two in its
entirety.

Will Counsel please make an offer?

Mr. COLE: It is offered for the purpose of showing an effort to
get facilities for shipping their coal.

Mr. O'LAUGHLIN: Exhibit No. 3 is objected to for the reasons
already stated.

Plaintiff's Exhibit No. 4 is objected to for the reason it refers to
a period not included in this action, it being stated that it is an
illustration of what happened three years ago, ever since three
years ago, and the letter itself is dated April 25th, 1903.

Mr. LIVERIGHT: We don't offer this as proof of the facts herein
alleged, but simply as showing persistent demand on our part to
get relief.

The COURT: Objection to Exhibit No. 3 is overruled, evidence
admitted, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. Were all of these copies of letters which have been shown you
dictated by you to some stenographer for the Company?

A. To Mr. Anvers, yes, my stenographer, who is present here.

The COURT: Objection as to Plaintiff's Exhibit No. 4 is overruled,
evidence admitted, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. As to Exhibit No. 6, Mr. McCormick, is that a carbon copy
of the letter sent to the person to whom it is addressed?

44 A. I think it is.

Q. Made at the time the letter was sent?

A. I think so. There is my stenographer's initials, VCM and A,
which is the insignia he usually puts on his letters.

Q. Is that a carbon copy?

A. No, I don't think so.

Q. Is it a carbon copy of the original sent to the party to whom
it is addressed?

A. No, it wouldn't have copy at the top of it.

Mr. O'LAUGHLIN: No. 6 is objected to because it is not a carbon
copy of the original of the letters made at the time the original was
sent nor is it a copy made by the witness of any letter which was
sent.

A. I wrote that letter.

Mr. BIKLE: And on the further ground that it is as it appears on
its face, as stated by the witness, a copy of the copy, and therefore
shows there is better evidence in the possession of the Plaintiff.

By the COURT:

Q. Did you say it was a copy of a copy?

A. I think it is because it is designated. I don't know whether it is a copy of a copy because Mr. Cassatt had the original, and if that is a copy it must be a copy of a copy in our file, but I dictated the letter.

Mr. LIVERIGHT: Exhibit No. 6 is withdrawn, with leave asked to substitute therefor paper now handed the witness.

Q. Is that the original carbon of the letter that was written by you to Mr. Cassatt in May, 1903?

A. That is the original carbon.

Q. On what letter head was that original written?

45 A. That was on a personal letter head of my own, I used sometimes smaller note paper.

Mr. O'LAUGHLIN: We make the objection which we formerly made to No. 6, and the additional one that the statements made in the letter are self-serving.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

Mr. LIVERIGHT: Original Exhibit No. 7 is withdrawn.

Q. I hand you carbon copy of letter dated May 15, 1903, addressed to A. J. Cassatt. Is that a carbon copy of the original?

A. This is the copy.

We offer this in substitution for original Exhibit No. 7.

Mr. O'LAUGHLIN: Objection to this one is restricted to the fact it is a self-serving declaration, and for that reason it is incompetent, irrelevant and immaterial.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

Mr. O'LAUGHLIN: We object to No. 16, there is no evidence it is the original or that it was sent or who received it.

Mr. LIVERIGHT: The witness has testified already this was the original telegram received by him.

Mr. BIKLE: The objection is, there is no evidence it was sent by the person by whom it purports to be sent.

Mr. COLE: We will withdraw it until morning.

Mr. LIVERIGHT (reading):

46 *(Copy of Plaintiff's Exhibit No. 3.)*

"April 13th, 1903.

Mr. G. W. Creighton, General Superintendent, P. R. R., Altoona, Pa.

DEAR SIR: Enclosed please find abstract from letter from our mine superintendent, which is self-explanatory.

Yours truly,

— — —, Treasurer.

April 13th, 1903.

Copy from Letter of April 9th, 1901, from Superintendent Sonman Shaft Coal Co.'s Mines.

'Referring to our conversation over phone this A. M. in regard to Phila. & Reading order, would say that the mine is in the best shape to load than it has been since I have been here. The mine foreman and myself have used every effort to get men to fill the mine up and be in position to take care of a steady supply of cars. It has been an effort on our part to get men and we have promised most every possible thing to get them to come to work here. The mine has always run so irregularly that the men have no faith in it running steady.

I think it has been proven in the past that the Penn'a R. R. Co. cannot or will not give us a supply of cars sufficient to run the mine to its capacity, and as I see there is only one of two things to do; either to load foreign cars or build cars of our own.

We have now a fairly good crew of drivers and are in position to take on a regular car supply and if we lie idle any length of time, it means that the men will leave and the next time we want to fill the mine up, it will take six months instead of six weeks to do so. By running the mine in spurts as has been done in
47 the past, we have no chance to open up new work and the mine instead of going ahead is really going backwards and the time has come when we must open up a new body of coal."

(Copy of Plaintiff's Exhibit No. 4.)

"April 25th, 1903.

Mr. A. J. Cassatt, President P. R. R. Co., Philada., Pa.

DEAR SIR: As you requested during our conversation on Thursday at Donegal, in regard to car supply at Sonman, I herewith enclose correspondence with Mr. Creighton and I could send you correspondence exactly similar carried on continuously during the past three years.

We now have a vessel waiting at Greenwich, which was to have arrived last Thursday, and we should have commenced shipping the coal for this cargo on last Saturday, but only received eight cars on that day, eight on Monday and four on Tuesday. On Wednesday, we shipped the twenty cars which had been accumulating during the four days. Since Wednesday we have received no cars at all and the vessel is waiting at Greenwich and we will have to pay demurrage. We have made repeated requests at Altoona, from the mine, for sufficient cars to fill this order, stating the urgent need but have been unsuccessful.

This treatment is a good illustration of what we have been experiencing ever since we started, three years ago. We have only received during the past year an average of eight cars per day, while

the railroad company rates us at 35 cars per day and our capacity is even greater.

Thanking you for your interest in this matter, I remain
Very truly yours,"

48

(Copy of Plaintiff's Exhibit No. 5.)

"April 28th, 1903.

Mr. G. W. Creighton, General Superintendent P. R. R., Altoona, Pa.

DEAR SIR: In order that you may fully understand the seriousness of the situation at our operation, we quote from letter of our superintendent, dated April 27th, and hope that you can do something without further delay to give us a fair supply of cars.

'It is hard to make shipments without cars. Do you see any prospects of getting any? Most of our men have left us and should we get a run of cars tomorrow we could not take care of them, and are unable to say how long it would take us to pick up enough men to put out a full run. The mine has such a bad name that the only men we can keep is a lot of rascals who can not get work elsewhere.'

This state of affairs is entirely due to failure to give us our just proportion of cars.

Yours truly,

SONMAN SHAFT COAL CO.,
Per ———."

49

(Copy of Plaintiff's Exhibit No. 6.)

"May 8th, 1903.

Mr. A. J. Cassatt, President P. R. R. Co., Philada., Pa.

DEAR MR. CASSATT: Since writing you April 25th, we have only received the following cars:

April	27th,	2/	100000#			
"	28th,	5	"			
"	29th,	to				
May	2nd,	4	"	,	1.70,	4/60, 1/50
"	5th,	9	"			
"	7th,	2	"			

We cannot understand this, as we are informed from various sources that many of the coal mines are receiving more cars than they need and that coal is hard to sell. We have taken yearly contracts and are unable to fill same. We are being discriminated against and we would appreciate greatly if you could in some way see that we receive fair treatment from your company. Am sorry to trouble you about this matter, which may seem small to you, but it has

been a constant source of trouble and worry from the time we first started to operate, four years ago.

Yours very truly,

vcm-a"

50

(Copy of Plaintiff's Exhibit No. 7.)

"May 13th, 1903.

Mr. A. J. Cassatt, President P. R. R. Company, Philada., Pa.

DEAR SIR: Yours of 9th inst. received, enclosing copy of letter from Mr. W. W. Atterbury, General Manager, in regard to car supply at Sonman Shaft.

According to Mr. Atterbury's figures we were entitled to 1702 cars from September, 1902, to April, 1903, inclusive, which is less than 25% of our rating. Are we not entitled to as large a percentage of our rated capacity as any other shipper on your road, and, if so, can it be possible that no other mine during the period referred to received cars for more than 25% of its capacity?

With regard to my impression that many of the mines received more cars than they needed, I understood you in our conversation at Donegal that such was the situation and you seemed surprised that at that time we were not getting a fair supply of cars. That information was confirmed by a superintendent of the P. R. R. who also expressed surprise to a representative of our company that we were not at this time receiving all the cars we needed.

Do you believe with Mr. Atterbury that we have been reasonably well taken care of in the matter of car supply and that we received as large a proportion of cars as Berwind-White?

Thanking you for your interest in this matter, I remain,

Yours very truly,

vcm-a"

51

(Copy of Plaintiff's Exhibit No. 10.)

"Feb. 1st, 1904.

Mr. G. W. Creighton, General Superintendent P. R. R., Altoona, Pa.

DEAR MR. CREIGHTON: We have had outrageous treatment in the matter of car supply during the past month. We realize the difficulty in making a good movement under the weather conditions, and would not complain if everyone suffered the same proportion, but when our records show the Berwind-White Co. to have received on the Scalp Level Branch 125 steel cars on the 27th ult. and 130 on the 28th ult., while we received on those dates only 2 cars, it seems to us to be rather unreasonable. Can you not do something for us, as we are having contracts continually cancelled owing to our not being able to furnish coal on account of car supply?

Very truly yours,

_____, Treasurer.

vcm-a"

52

(Copy of Plaintiff's Exhibit No. 11.)

"February 29th, 1904.

Mr. M. Trump, Acting General Superintendent P. R. R., Altoona, Pa.

DEAR SIR: We have a vessel at Philada. awaiting coal from our mine, which coal is to be shipped to Charleston, S. C., where we have a contract to supply coal to the Charleston Consolidated Railway, Gas & Electric Co. They are nearly out of coal and will have to shut down if we cannot ship them coal. Can you not give us a special order for twenty steel cars, at once? Last month we averaged only four cars per day, which was certainly poor treatment, considering our capacity is forty cars per day? I took the matter up with Mr. Creighton, who wrote me that he realized we had not received our full proportion and would make it up this month. During February we have received an average of only five cars per day. I hope you will be able to give us more cars, but we must have twenty steel cars to load the vessel now waiting at Greenwich.

Yours truly,

— —, *Treasurer.*

vcm-a"

53

(Copy of Plaintiff's Exhibit No. 12.)

"March 29th, 1904.

Mr. M. Trump, Act'g Gen'l Superintendent P. R. R., Altoona, Pa.

DEAR SIR: Last week we received only seven steel, five hopper and two foreign cars, just enough for one day's run. We are not receiving enough cars to keep our own concerns supplied. Our neighbors are getting more cars. Can you not do something for us?

Yours truly,

— —, *Treasurer.*

vcm-a"

54

(Copy of Plaintiff's Exhibit No. 14.)

"M. P. 500.

Coal.

The Pennsylvania Railroad Company.
Philadelphia, Baltimore & Washington Railroad Company.
Northern Central Railway Company.
West Jersey & Seashore Railroad Company.

Office of General Superintendent Motive Power.

ALTOONA, PA., October 14th, 1905.

A. W. Gibbs, General Superintendent Motive Power.

Reply to Desk 3.

Sonman Shaft Coal Company, Harrisburg, Pennsylvania.

DEAR SIR: Upon receipt of this letter, please arrange to ship 50 tons of blacksmith coal per week to P. R. R. care of W. F. Eberle, Altoona Car Shop until further notice.

Notices of shipments made on account of this order should be forwarded to this office on M. P. 38 and on M. P. 131 to Mr. C. T. Witherow, Motive Power Clerk, Altoona, Pa.

Supply of these blanks are being forwarded to you to-day by Adams Express.

As the coal is to be used for blacksmithing purposes special care should be taken in the preparation of same. We are at present time paying \$1.25 per net ton f. o. b. car mines for blacksmith coal and will pay you this price providing the coal is satisfactory.

Bills for this coal should be rendered monthly and forwarded to Mr. R. N. Durborow, Superintendent Motive Power, Altoona, Pa. We have arranged for car supply.

Please advise if you will accept the order.

Yours truly,

A. W. GIBBS,
Genl. Supt. Motive Power."

55

(Copy of Plaintiff's Exhibit No. 13.)

"October 5th, 1905.

Mr. A. W. Gibbs, Gen'l Supt. Motive Power P. R. R. Co., Altoona, Penn'a.

DEAR SIR: We are in receipt of yours of 4th inst. and have entered your order, as follows:

P. R. R. Co. c/a W. F. Eberle, Altoona Car Shop, Altoona, Pa.:

50 tons of blacksmith coal per week, until further notice. Price F. O. B. mines, \$1.25.

We understand that notices of shipment on account of this order are to be forwarded to your office on form M P 38 and to Mr. C. T. Witherow, M. P. Clerk, Altoona on M P 131, bills to be rendered monthly to Mr. R. N. Durborow, Supt. M P, Altoona, Pa. We note that you have arranged for car supply.

Yours truly,

———, *Treasurer."*

56

(Copy of Plaintiff's Exhibit No. 15.)

"October 7th, 1905.

Mr. A. W. Gibbs, Gen'l Supt. Motive Power P. R. R. Co., Altoona, Pa.

DEAR SIR: We have received your telegram of this date. Since entering your order we have received five per cent. of the number of cars to which our rating entitles us. On this basis there would be due on your order about two tons and a half. Under the circumstances we can not ship any coal to you today.

Yours truly,

SONMAN SHAFT COAL COMPANY,
Per ———, *President."*

(*Copy of Plaintiff's Exhibit No. 16.*)

"Postal Telegraph-Cable Company in Connection with The Commercial Cable Company.

Telegram.

46 G DA X 37 D. H. 3.21 P. M.

ALTOONA, PA., October 9, 1905.

Sonman Shaft Coal Co., Mr. Vance McCormick, Treas'r Hbg., Pa.

If you have not already filled your order for fifty tons blacksmith coal per week to Altoona Car Shop please arrange to make a shipment on this order today if possible as the supply is exhausted answer.

A. W. GIBBS."

57

(*Copy of Plaintiff's Exhibit No. 17.*)

"M. P. 500.

Coal.

The Pennsylvania Railroad Company.

Philadelphia, Baltimore & Washington Railroad Company.

Northern Central Railway Company.

West Jersey & Seashore Railroad Company.

Office of General Superintendent Motive Power.

ALTOONA, PA., October 13th, 1905.

A. W. Gibbs, General Superintendent Motive Power.

Reply to Desk 3.

Sonman Shaft Coal Company, Mr. Vance McCormick, Treasurer,
Harrisburg, Pennsylvania

DEAR SIR: Upon receipt of this letter please arrange to cancel the order for 50 tons of blacksmith coal per week to P. R. R. care of W. F. Eberle, Altoona Car Shop.

Please acknowledge receipt.

Yours truly,

A. W. GIBBS,
Gen'l Supt. Motive Power."

58

(*Copy of Plaintiff's Exhibit No. 18.*)

"October 19th, 1905.

Mr. A. W. Gibbs, Gen'l Supt. Motive Power P. R. R. Co., Altoona, Pa.

DEAR SIR: As per your letter of 13th inst., we have cancelled your order for 50 tons per week of blacksmithing coal to be consigned to

P. R. R. c/a W. F. Eberle. Mr. Atterbury had promised to aid us in our car supply, but it has continued so poor that we have been unable to fill your order. Regretting the necessity for this,

Yours truly,

SONMAN SHAFT COAL CO.,
Per A"

(Copy of Plaintiff's Exhibit No. 19.)

"Pennsylvania Railroad Company,
Pennsylvania Railroad Division,
Office of General Superintendent.

G. W. Creighton.

ALTOONA, PA., February 3, 1904.

Mr. Vance C. McCormick, Treasurer, Sonman Shaft Coal Co., Harrisburg, Penna.

Acknowledging your favor, February 1, relative to the distribution of cars. It is true that the number delivered to your operations, during the month of January was a little short of their proportion. We have arranged to make up this shortage, at the earliest moment.

G. W. CREIGHTON,
General Superintendent."

59 By Mr. LIVERIGHT:

Q. Do you recall any shortage having been made up?

A. Not to my knowledge.

Q. What was the demand from 1903 to 1908 for Sonman coal?

A. There was always a good demand for Sonman coal.

Q. From April 1st, 1903, to April 1st, 1904, what kind of demand had you in the way of regular contracts and promiscuous orders?

A. Well the coal of Sonman's character, it was customary with the high grade coals to contract for the output of the mine before the first of April, and we endeavored to do that, and there would have been no difficulty whatever to have contracted for our entire output to the full capacity, provided we could have assured the consumer they would get the coal.

Q. With whom did you have dealings in reference to the output of your mine from 1903 to 1904?

A. We sold coal to our own iron concern in Harrisburg, The Central Iron & Steel Company, of which at that time I was a director, and to the Central Pennsylvania Traction Company, of which Mr. Cameron was a director, and to the Keystone Coal & Coke Company, of which Mr. R. K. Cassatt was manager. We sold a great deal of coal through Mr. R. K. Cassatt and a number of other concerns. James Boyd & Company.

Q. How many cars a day was the James Boyd & Company order?

A. 15 cars a day. We had contracts I think that year on our

books for about 22 cars a day and we only took one half our capacity. We thought we were safe on that. The strike was over and we thought in 1903 we should have a fair run of cars, and in taking the matter up with the Railroad officials thought we could
60 safely contract for at least 22 cars.

Q. How did you sell your coal, gross or net ton?

A. We sold our coal gross ton, except to the Railroad Company and when they bought coal they bought it net ton.

Q. What was the prevailing prices for the year from 1903 April 1st to 1904 April 1st?

A. We took all our contracts nearly April 1st, 1903, at \$1.75.

Q. During the course of the year was there any change made in prices on your coal?

A. Yes, some of the West Virginia coals reduced the price.

Mr. O'LAUGHLIN: We object to that.

By Mr. LIVERIGHT:

Q. You say you had contracts on your books for 22 cars a day, about one half your capacity. Did you have any other opportunities to sell coal that year from Sonman Shaft that you didn't grasp?

A. We could have always sold more coal than we could get out, more coal than we could ship.

Q. Who stood ready to buy it?

A. Well I was in communication with all the big coal dealers in Philadelphia. Madierra-Hill & Company, George B. Newton & Company I think it was then, and Pennsylvania Coal & Coke. The Baker, Whitley & Company of Baltimore. I just don't remember. We had inquiries from Ernest Long & Company.

Q. Anyone else?

A. These people we sold to would have liked to have taken more but we were afraid to contract for more because we couldn't deliver it. Our experience had been that we had to disappoint so many of our customers that we were compelled to cut down the
61 allotment to our different customers.

Q. What reason was there for your failure to deliver?

A. Because we could not get cars. The Central Iron & Steel Company, of which I was a director, we could have given them all their steam coal. We were forced to buy coal from Berwind-White so they would be sure of getting the coal, because Berwind-White got the cars. That was recognized by the coal trade and we were up against that in our bidding. People said they liked our coal that wanted to buy it but we don't know we are going to get the coal and how can we make a contract with you, we would rather go where we can get it.

Q. How did you make out on the 22 cars a day you had on your books?

A. We averaged that year I think eight cars a day.

Q. Did you apply that on your contracts?

A. We applied that on our contracts pro rata. We tried to distribute it fairly among all our customers. Afterward some of them were given up.

Q. How was the demand for your coal, April 1904 to April 1905?

A. The demand was good. We could have contracted before April 1st, 1904, for the entire output at fair prices.

Q. For that year?

A. Yes sir.

Q. Who was calling on you for coal at that time?

A. These same coal dealers.

Q. How about the Keystone Coal & Coke Company?

A. The Keystone Coal & Coke Company we made a contract with them. The Keystone Coal & Coke could have handled a much greater tonnage and wanted it, if we could have assured them the cars. They wanted it so badly they frequently put their own cars in for us.

62 Q. At your mines?

A. They placed their own cars at our mines.

Q. In what year was there a suspension of work at your mines?

A. That year in September the mine was flooded.

Q. How long did that suspension continue?

A. I think until May, 1905. It was during that period Mr. Saxman got cold feet and resigned.

Q. The year from April, 1905, to April, 1906, how was the demand for your coal?

A. The demand was good. We never have had any trouble on Sonman coal. It is the best steam coal in Pennsylvania and it is the first coal that is always contracted for in the market and it always gets the best prevailing prices and there is no trouble. It is the same coal all our neighbors, The Henrietta and Columbia, and all our neighbors, contract for their entire output for the year at the top prices.

Q. Did you have inquiries and requests for your entire output for that year?

A. Yes, we have had inquiries from coal men like the Madierra Hill & Company, who wanted to handle our entire output. Ernest Long & Company who wanted to handle our entire output. I am not sure they did that, remember, 1904.

Q. This is 1905?

A. Yes, 1905 and 1906.

Q. How about Pilling & Crane?

A. Pilling & Crane would have liked to have had our coal.

Q. To the extent of the entire output?

A. Yes sir.

Q. Do you know how many tons they named as the quantity they would take?

A. No, I can't say that definitely. They knew the size of the mine and what it ought to do.

63 Q. What did you do with these propositions to take the entire output of your mine?

A. We turned them down.

Q. For what reason?

A. The reason was on account of our uncertain car supply. We couldn't deal and make any contracts of advantage to ourselves

under the existing conditions. We couldn't fairly put these men in an awkward position, because we had lost too many good customers due to inadequate car supply. We lost some very good customers because we couldn't ship the coal and they went to people who could ship the coal.

Q. Can you name any of them?

A. I remember one order particularly was Diston, a very nice order I think Madierra-Hill & Company had.

Q. Tacony, Pa., was it?

A. Yes sir. The Traction Company at Harrisburg. We had so irregular supply there they got coal elsewhere. The Central Steel & Iron Company, with which I was connected.

Q. What conditions prevailed in the years 1906 and 1907 with reference to demand for your coal and ability to fill orders?

A. There was a good demand during that year.

Q. Of the same character you have narrated?

A. Yes, I think the demand was a little better in 1906 than 1905.

Q. How did the prices run for the years succeeding April 1, 1904, you have given the figure for the year prior to that date?

A. I would want to refresh my memory and look at our contract prices of the 1st of April, 1904. They were lower than they were the year previous. I don't remember exactly the exact figure on them, but my impression is about \$1.35, although I would want to confirm that by looking up our contracts.

64 Q. How were the prices of Sonman coal compared with other Cambria County coals, say coal of the Black Lick region?

A. Well we figured there were from 10 to 25 cents better price. We figured on getting from 10 to 25 cents more for Sonman coal than for these other coals, depending upon the season in which it was sold of course.

Q. You say you figured upon getting it. State whether or not you got it?

A. We did get from 10 to 25 cents more than the ordinary Cambria County coals. We had that experience with that Lemon vein, which we leased for just a short time. The price of that coal was considerably lower than our Sonman Shaft coal.

Q. That is the price of the vein that was operated at the drift?

A. Yes, the drift coal.

Q. The drift that you abandoned?

A. Yes, we couldn't get enough cars for our shaft and had to abandon the drift. We couldn't operate it.

Q. State what the market demands for coal were in the period from April 1, 1903, to April 1, 1907; that is to say, whether there was anything extraordinary in the market during that period?

A. I don't remember anything extraordinary. Simply to my mind normal years. The country was in fairly good shape, I mean ordinary business condition, fairly good business condition.

Q. Apart from the bituminous strike in 1906, from April to

July, was there anything you know of to disturb the general demands and equilibrium?

A. Not that I remember. I don't know of anything. At the end of 1907 there was a panic. At the end of 1907 a panic struck the country.

65 Q. How much coal per month, if you can recall it, did the Sonman mine actually ship at the time of the panic, in the fall of 1907?

A. I would have to look up my figures on that.

Q. Can you by refreshing your memory fix the prices of coal for the balance of this period?

A. From the 1st of April, 1903, to April 1904 our contract price was \$1.75.

By the COURT:

Q. What is that?

A. That is taken from our contracts. This is a record of our contracts we have on file of the coal we sold in those years.

By Mr. COLE:

Q. Is it made up under your supervision so you know it is correct?

A. These were made up under Mr. James B. Neale's supervision, President of the Company, in later years when he became active in it.

By Mr. O'LAUGHLIN:

Q. When were these made? When was this one made you are looking at?

A. I don't remember the exact date. After the date the suit started.

Q. I want to see what the things are you get them off. You say contracts?

A. I won't quote these, but I will state them myself as contracts, from my memory refreshed.

Q. Let us see one of them and maybe we haven't any objection at all.

66 By Mr. LIVERIGHT:

Q. What have you before you from which to refresh your memory?

A. Contracts with the Keystone Coal & Coke Company for 12,000 tons of coal for the year from April 1st, 1903, to March 31st, 1904, at \$1.75 per gross ton f. o. b. mines, net to us.

Q. What else?

A. That is his offer over the telephone. I have our acceptance of it, which is dated March 27th, 1903, the next day. Then we have James Boyd & Company's proposition contract. They agree to make contracts for Sonman coal up to 15 cars per day, all at prices which would net you \$1.75 per gross ton at the mine.

Q. You have. Who?

A. The Sonman Shaft Coal Company.

Q. Now after refreshing your recollection as to the balance of the period of the action, what prices do you say you had orders for and could have gotten orders for for Sonman coal?

The COURT: I suggest if you have those handy and especially as Mr. McCormick says he didn't make them up after 1904.

A. I didn't make any of these up. I was an officer, but Mr. Neale made these from his office.

By Mr. LIVERIGHT:

Q. You have testified to orders booked for a considerable part of your tonnage, inquiries for the balance of your tonnage and opportunities to sell all your tonnage, provided you had been able to guarantee deliveries. On what basis were these orders taken and inquiries for coal made, that is, how were you to sell the coal, what delivery?

A. I don't know that I understand.

67 Q. Where was it to be sold?

A. At the mines. The coal was all delivered f. o. b. cars at the mines.

Q. By the plaintiff in this case?

A. By the plaintiff. The Sonman Shaft sold the coal to be delivered f. o. b. the mines, at the pit.

(Witness withdrawn from stand.)

VANCE C. McCORMICK, recalled on part of plaintiff.

By Mr. LIVERIGHT:

Q. In reference to car service and car supply subsequent to 1903, did you have interviews with any of the officials of the Railroad Company?

A. I did.

Q. With whom?

A. We had interviews with the President, Mr. Cassatt, and interviews with Mr. Atterbury, and interviews with Mr. Trump.

Q. In what did these interviews culminate finally in the fall of 1905?

A. They culminated finally in our being compelled to purchase some of our own cars.

Q. At whose suggestion was that done?

A. Well we were forced to do it, we weren't getting any cars enough to run our mine and we were compelled to purchase our own cars and we were advised by some of the Railroad officials to do so. I don't just remember the individuals who advised us on that point. But we consulted with them of course fully before we went over the situation finally, explained our situation and then purchased these 80 cars.

Q. What kind of cars were they?

A. They were 100,000 pound capacity standard Pennsylvania steel cars.

68 Q. Were they used at your Sonman Shaft thereafter?

A. Yes, altogether at the Sonman Shaft.

Q. Beginning when?

A. They were delivered, I don't know the exact date, I would have to look that up from records to see when it first began. The fall of 1905 I think, but I would have to look that up.

Q. What was the regulation of the Pennsylvania Railroad Company as to the manner in which individual cars should be counted against distribution?

A. Our understanding was individual cars did not count against your share of P. R. R. equipment.

Q. Do you know whether there was any change in that distribution rule made shortly thereafter?

A. I think shortly after that time there was a change made.

Q. What rule then was in force?

By Mr. O'LAUGHLIN:

Q. Who are you quoting as to the rule?

A. I couldn't cite any individual, but it would be a simple thing to get from the railroad officials the exact arrangement. I couldn't exactly state it myself at that time.

By Mr. LIVERIGHT:

Q. State shortly thereafter, after your interviews with the Railroad Company and your purchase of individual cars, a change was made in the distribution rules by virtue of which there was a change in the service you obtained from the individual cars?

A. Yes, there was.

Q. Do you know how long after your purchase?

A. I don't exactly. It was several months after.

69 Q. Prior to the change in the rules what was the effect of the purchase of the cars upon the number or system cars you received from the Railroad Company?

A. I don't think I could tell you that.

Q. How long did you keep those cars?

A. We sold them a couple of years ago I think. We found when the change of rule went into effect that unless you had enough cars for your entire output, the individual cars weren't a great benefit under the present arrangement; in other words, they would force us to buy enough cars for all our shipments. Under the old system that wasn't necessary.

Q. In order to get a sufficient car supply state whether you made any other arrangements with any other operators for cars?

A. We frequently did that. We did that with the Keystone Coal & Coke Company. We would have to sell our coal at lower prices in order to get them to put their cars in. We sold below the market and we did that with Baker & Whitely. I have correspondence which shows we quoted Baker-Whitely \$1.50 on some coal and finally sold it at \$1.35. Of course they put their cars in.

Q. Did you make arrangements with any other operator?

A. We made arrangements with Berwind-White to place their cars at the mine.

Q. What was the outcome of that arrangement?

A. Of the Berwind-White arrangement? Well they placed us enough cars to mine a considerable tonnage. We sold the coal at lower prices than the market to get the cars.

Q. What was the market?

A. Do you mean what was the price?

Q. Yes?

A. I think my recollection is we sold the coal at \$1.20 to get their cars.

70 Q. Did you get their cars?

A. We always got the Berwind-White cars. When they said they would put cars in we got them.

Q. How many cars a day did that run?

A. I think we got enough cars for 500 tons a day for a time and later I think it was 750, but I would have to refresh my memory from the Berwind-White Coal Mining people.

By the COURT:

Q. When was that?

A. That was about the latter part of 1906 or 1907, I think probably 1907.

By Mr. LIVERIGHT:

Q. You say you dealt with them at \$1.20 a gross ton at the mines. What was the market price?

A. We always could have gotten, if we could have made our contracts for the year at prevailing prices, at \$1.35 during those periods before the first of April, which was always our plan of operation if we could do it.

Q. How many tons did you so sell to the Berwind-White Coal Mining Company?

A. The one contract I remember was 100,000 tons.

Q. For what period did that extend?

A. I think that was a year.

Q. Then in that year are we to understand your tonnage was considerably increased over what it had been previous?

A. Our tonnage was increased, due to our getting cars through this arrangement with Mr. Berwind.

Q. At this same time were you getting Keystone cars also?

A. I don't remember that.

71 Q. Were you getting cars put in by any other operator, Pennsylvania, Beech Creek & Eastern Coal Company, for instance?

A. They placed cars, not only that time but previous to that. We had sold to the then Pennsylvania Coal & Coke and they had placed cars, as well as Keystone and Baker-Whitely. A number of concerns did that with us. They would get our coal at reduced prices.

Q. Can you state the period of this supply?

A. No, I cannot at this time.

Cross-examination.

By Mr. O'LAUGHLIN:

Q. You have spoken several times about f. o. b. So that the jury may understand just what it is and we may, I will ask you a few questions about it. As to your sidings to your tipples who owns them, you or the Railroad Company?

A. We own them.

Q. Down to the switch with the branch?

A. Yes sir.

Q. And as to the coal which you sell standing on the siding what transpires, what are the facts, how do you go about it?

A. The coal is sold f. o. b. cars at the mines, that is, on board the cars at the mines, but it is sold by the railroad weights.

Q. Then the coal in the first place must be on the car on the siding before it is sold?

A. Before it is sold.

Q. And what you in fact sell is the car number, isn't it? Until you have a car number which has coal on it, you don't sell?

A. No, I suppose not.

Q. Outside of the contracts, if you during this time had a car of coal there, will you say so we will understand it what it is that happens between you and the man who buys it, when you sell?

A. Well when we sell a car of coal standing at the tipples—

Q. I mean the actual things that go on between you, so that we will understand it?

A. That is before the car is sold?

Q. Yes sir?

A. The first thing that is done, they mine the coal to get it in the car, and then we have an order for the coal and the coal shipped to the consignee.

Q. That is, you mean you have a written order and the coal is shipped then to the consignee?

A. The order comes to the office at the mine and the mine superintendent gives the shipping directions to the railroad official, the proper official, who sees that the coal is shipped to the proper party.

Q. What does he do with the proper party?

A. The proper party, if he has got the money, pays for the coal.

Q. What does the mine man do who tells the railroad company about it, what does he do with the consignee?

A. You mean the details of the shipping arrangement?

Q. Yes?

A. I would have to ask you to let the men out at the mines give you the details of the shipping. I am not a mine man and am not familiar with the bills of lading and all the paraphernalia. I was in the Harrisburg office.

Q. What did you do in the Harrisburg office when you sold the car of coal?

A. We would notify the mine, send a copy of the order right to

the mine. Mr. Anvers would take the order from me and send it out to the mine.

Q. If you got a telephone or a letter inquiring for a car of coal and quoting a price you would take, you would answer that
73 man and say whether or not you would give it to him?

A. Yes sir.

Q. Then if you did give it to him, you would send an order to the mine to ship it to him?

A. Yes sir.

Q. The next thing that would happen, when it was on the car it was shipped to him and the railroad told, as you said, to manifest it?

A. Yes sir.

Q. On any of these orders that you have spoken of did you folks have the freight to pay?

A. I don't think any of those contracts that I have spoken of that we had. On our Charleston contracts we paid the vessel. No, we didn't pay the vessel charge. No, I don't think we paid the freight on any of them. I think they were all sold f. o. b. cars at the mines.

— If from the time you started it going until it reached the consignee it would become destroyed, what happened as between the consignor and the consignee?

Mr. LIVERIGHT: We object to that as not cross examination.

A. I presume we put a claim in for the damage that had been incurred.

By Mr. COLE:

Q. Wouldn't the man who owned this coal put the claim in?

A. The man who owned the coal?

Q. Yes, the man you sold it to?

A. I presume so.

By Mr. O'LAUGHLIN:

Q. You have heard the discussion as to the rules and custom that are said to and said not to obtain in the coal business. Is
74 it or is it not a custom in the coal business for the consignor to make good a car of coal which is lost in transit or taken in transit by some one else before it reaches the consignee and which was sold to the consignee at a price f. o. b. the mines?

Mr. COLE: We object to that as irrelevant, incompetent and immaterial, and further as not cross-examination. It has no bearing upon the matter in controversy here.

The COURT: I think we will hear the testimony, note an exception for plaintiff and seal bill.

A. There must be some regulation for a matter of that sort. I don't remember in our experience of having any claims or any difficulties of that kind.

By Mr. COLE:

Q. Do you know any custom that prevails in the matter?

A. There must be some custom.

Q. The question is, do you know of it?

A. I couldn't swear as to the exact method of placing a claim or how it was done, because I don't remember of having done it, but there must be some custom or regulation with the railroad and shipper.

Q. That isn't the question whether there is or not, the question is whether you know it?

A. I am not familiar with the details, but there is a regulation of some sort.

By Mr. O'LAUGHLIN:

Q. Do you or do you not yourself know the regulation you speak of?

A. I do not, Mr. O'Laughlin.

Q. At the Sonman mine, during the term of this suit, from April 1, 1903, to April 1, 1908, did or did not the Company have a lost car of coal or a car which did not reach the consignee and which was sold the consignee f. o. b. the mines?

Mr. COLE: That is immaterial, irrelevant and not cross-examination.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. If coal shipped by your Company to a consignee should not be delivered to the consignee and if it were sold f. o. b. the mines to the consignee, would or would it not under the rule and custom of your Company be billed to the consignee and a collection for it endeavored to be made from the consignee?

Mr. COLE: That is objected to as incompetent, irrelevant and immaterial. It is not offered to prove a custom that changes the meaning of the term f. o. b. cars in law and it is not competent to prove a contract. It is purely an academic question and is based upon a hypothesis, the facts of which are not proven.

The COURT: We will sustain the objection, exclude the testimony, note exception for defendant and seal a bill.

By Mr. O'LAUGHLIN:

Q. In your testimony in chief you quoted a price at \$1.75 f. o. b. the mines. What do you mean as to that having been offered; you quote it as having been offered you by the purchaser from you?

A. Well they offered to buy the coal at \$1.75 a gross ton on cars at the mines. F. o. b. cars at the mines.

Q. What do you mean f. o. b. cars at the mines?

A. I mean the coal loaded on the car at the mine.

Q. In one of these letters, which you identify as having been sent by you to Mr. Trump, February 29th, 1904, being

Exhibit No. 11, you make reference to a special order. What is that, Mr. McCormick?

A. I don't know that I remember, Mr. O'Laughlin, that special order. That special order was simply this——

Q. Only define the general term?

A. We had this contract for the Charleston Consolidated Light, Heat and Power Company, of Charleston, South Carolina. All that coal had to be shipped by schooner from Philadelphia and those schooners hauled anywhere from 750 to 1000 tons. They could not remain at the Philadelphia piers for a longer time than probably a week, and frequently we would charter schooners and wouldn't get enough cars to fill them and we would lose the schooner and have to pay charges for them if they held over a day, and we would often ask for a special order from the Railroad for enough cars to load the schooner so we could keep the companies in light and keep the trolley running. If you notice in the correspondence that happened a number of times and I think that is what that special order referred to at that time.

Q. What was it you wanted Mr. Trump to understand from your request when you mention special orders?

A. We wanted him to understand that unless we got 20 cars at that time immediately, we were only getting, as I remember it, at that time 3 or 4 a day or 6 or 7 a day, I don't remember the exact figures, we could not possibly have loaded that schooner, and we just begged him for a special order for 20 cars to keep those people in coal to give the City of Charleston light and power to run their traction company.

Q. Did you or did you not get the cars you asked Mr. Trump about?

A. I don't remember at that particular time, we may have. I would have to go back over the daily car sheets to see. We
77 frequently did when we would tell him we had a schooner and we were getting no cars and they took pity on us and mercy on us and handed us out 20 cars at one time. We would go to see them and tell the railroad officials and after our plea and giving them a pitiful story and outrageous treatment, we sometimes got those 20 cars, but it never lasted and our average running there, the years as I told you, about 8 cars one year and before that an average of 6 or 7.

Mr. BIKLE: I must again ask that latter part be stricken out, because the witness knows the eight cars were from April 1st, 1903, as he testified.

Q. That is true?

A. Yes sir, that is true.

The COURT: You want the — prior to that? Let that be stricken out.

By Mr. O'LAUGHLIN:

Q. In Exhibit No. 17, Mr. McCormick, there were 50 tons of coal ordered of your Company and another exhibit following it, which

is the answer apparently, the order is cancelled. Both these are in October, of 1905. Did or did not the Railroad Company furnish you with cars for the shipment of that?

A. They did not.

Q. Furnished none?

A. I don't remember whether they furnished any. We gave them exactly the pro rata of their order and you see they got two tons I think according to our letter. I remember Mr. Cameron told them to send a wheelbarrow for their share of the coal. We were to get cars for it. That was after one of our visits to the other officials. They were going to give us a Company order and that was the Company order they were going to give us to help us out.

78 Q. This was 50 cars?

A. It was 50 net tons a week I think of blacksmith coal.

Q. In reaching the prices you obtained at your mine during the time of this action you had a statement which Counsel threatened to look at last night to try and avoid wasting time, but I guess we were all too busy. Have you those arranged in any way so we can get at it without spending a great deal of time?

A. What papers?

Q. The letters we examined, three or four altogether yesterday?

Mr. LIVERIGHT: They are separated out and we will submit them to you at noon.

By Mr. O'LAUGHLIN:

Q. As to these people who asked you for coal and whose letters you have here, are they all consumers?

A. No.

Q. Specifically now Madiera-Hill & Company you referred to in your examination in chief, are they consumers or brokers?

A. No, they are brokers, dealers.

Q. The Boyd Company?

A. They are dealers.

Q. Newton & Company?

A. Dealers.

Q. Baker-Whitely Company?

A. Dealers.

Q. They are located in Baltimore, Maryland?

A. Yes.

Q. The Traction Company was a consumer?

A. Consumer.

Q. At Harrisburg?

A. Yes sir.

79 Q. Did or did they not get the coal notwithstanding you were unable to supply it?

Mr. COLE: What has that got to do with it. It is immaterial and irrelevant and we object to it.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. Did Newton & Company inquire of you for bituminous coal?

A. They did. It was Madiera-Hill & Company, and then they changed to Newton & Company, and now they are back again to Madiera-Hill & Company. Newton & Company used to be the hard coal end I think, but they combined.

Q. Did you have to refuse to sell to Madiera-Hill some of the coal they inquired about to George B. Newton & Company?

A. Yes, Mr. Percy Madiera is a stockholder in our Company, a small stockholder.

Q. Did you also have to refuse the Boyd Company in Harrisburg?

A. Yes. Well we made the contract with them, which we could not supply coal on and after that time they didn't want to touch us.

Q. Well did these dealers you speak of get their coal then from Berwind-White?

A. Why I have no doubt every dealer we have mentioned there has at some time or other bought coal from Berwind-White. I don't know, of course, who they buy coal from. I have never had access to their records. Some of them were miners themselves and had their own mines.

80 By Mr. COLE:

Q. Neither Madiera-Hill or any of the rest of these people went out of business because they couldn't get coal?

A. They are all in business today I think.

Q. They all get coal?

A. James Boyd & Company are not selling coal today. The rest I believe are.

By Mr. O'LAUGHLIN:

Q. Do you, as to the orders you spoke of as having received, know as to any of them before you received them or after where inquiries were made?

A. I don't know that. It may have been, I don't know.

Q. Do you know from any of the consumers who have made these inquiries of you didn't get the coal they wanted, the volumes of coal they wanted for their purposes?

A. No, I don't know of any of them. A number of consumers, in which we were interested, had to buy coal from other people and at higher prices than they had contracted with us.

Q. On the market is your coal, the Sonman or Miller coal, a higher price than the Moshannon or "D"?

A. The best Moshannon coal I would say it was about the same price. There is not much of that left. We were never bothered much in competition with the Moshannon. We were up against the Georges Creek. It was the same grade as Georges Creek and coal of that grade, the best coal in the market.

Q. Your prices you would get in the market would run about the same grade as Moshannon coal in this region?

A. I am not familiar enough with the Moshannon prices to say. The Sonman coal is a different thing from the Miller coal. There

81 are some Miller coals that are not as good grades, run anywhere from 10 to 20 or 25 cents lower price than the Sonman coal, which is the Wilmore coal, the Wilmore basin coal about South Fork, Portage and Sonman. The Henrietta Coal Company and Columbia Coal Mining Company is our grade.

Q. The Sonman was it steam coal or blacksmith?

A. It is both. It is a very high grade steam coal and smithing coal. We could have shipped a very great deal of it West, if we could get cars. We did ship to Chicago for smithing purposes.

Q. The prices obtained for smithing purposes is greater than for steam purposes?

A. To everyone but the Railroad Company. It net us \$1.35 net, is what \$1.45 gross, that is the price we got from the Railroad Company at that time. On carload lots for smithing purposes West we got higher prices.

Q. The trade smithing price is higher than the trade steam coal?

A. For the quantity we sold we could get better prices than for steam purposes. That was in the West. I don't remember selling smithing coal East at all. We did very little business in that, because we couldn't get enough cars to make it worth while.

Q. Did the Sonman coal for smithing purposes require a different preparation than it did for steam purposes?

A. No, I think we always shipped run of mine. I think in those days we never had but one tippie and we had to ship it all run of mine.

Q. In your vein of coal was there any impurities that had to be extracted before it was marketed?

A. No, we had no preparation at all. We just ran the raw coal from the mine on to the railroad car.

Q. Slack and all?

A. Yes, everything. We had no grades. All one grade. Run of mine coal.

82 Q. Where did you buy the 80 steel cars?

A. I think from the Pressed Steel Car Company. They were bought through a second party. They already had been purchased by someone and we took his contract off his hands. Colonel Coryell I think it was.

Q. Were they new cars?

A. New steel cars. They came right from the shops to us.

Q. They had been bought under contract by Colonel Coryell before that?

A. I think so. I think though we dealt direct with the Steel Company, but I think the order was turned over to us. I think we dealt direct with the Pressed Steel Car Company.

Q. In what year was it you bought them—1905?

A. I think in the fall of 1905.

Q. In what year did you sell them?

A. I don't remember that. We sold them I think about a couple of years ago, but I am not positive of that.

Q. Since 1908?

A. Yes, I am almost sure it was since 1908.

Q. Did you sell them in bulk, sell the 80 to some one else?

A. We sold the 80 to some one else in bulk.

By Mr. COLE:

Q. They were actually sold in 1909?

A. 1909? Well, I didn't remember the exact date.

By Mr. O'LAUGHLIN:

Q. What was the highest output of the mine in a month, physical output?

Mr. LIVERIGHT: During what period?

83 Mr. O'LAUGHLIN: Since the mine started, to start with.

Mr. COLE: That is objected to.

By Mr. O'LAUGHLIN:

Q. 1903, April 1?

A. You mean up to date?

Q. No, during the term of this action?

A. I don't know whether I can answer that accurately without going over our tonnage statements.

Q. Can you give it to us in round numbers?

A. Well I remember one month of 10,000 tons, which was about the first part of this period, which was one of the good months of cars for us. I don't remember the other figures. I think we probably exceeded that up to 1907, although I would have to refresh my memory.

Q. During the month the Berwinds were giving you 500 tons a day in cars didn't you exceed that?

A. Yes, I think we did run up when we were getting a stated supply of cars. We must have exceeded that.

Q. During the months the Berwinds and Keystone were giving you some didn't you go above 10,000 tons?

A. We must have exceeded that. That was in the early part of the season and I think we probably did. We could have done it, no question about that, if we had a stated supply of cars.

Q. Did they not give you a stated supply of cars, as you said they did?

A. Yes, when Berwind was giving us cars we must have had a good run, for their tonnage alone was considerable that we were placing in their cars.

Q. In what year was that—the first year of this term?

A. The Berwind cars?

Q. Yes?

A. No, that was the latter end of it. It must have been about 1907 I think.

84 Q. Did you during 1907 only have the Berwind orders?

A. With their cars I think it was. It was 1906 or 1907. It was the latter part of this period of this suit.

Q. About one year of it you say?

A. I should say so.

Q. Was the Keystone order the same year?

A. I don't remember the exact time the Keystone cars were placed there. They were placed there at different periods, as I remember, all during the period.

Q. At different times there were some Keystones put in during any year of the period, is that it?

A. Every once in a while we couldn't ship coal on their contracts and we would beg them for cars and say we will give it to you for this price if you put the cars in. We did that for Baker-Whitely one period and they put cars in. Whenever we could get cars we sacrificed the price to keep the men there to keep the mine going. We couldn't keep the men there and the kind we could keep weren't the kind we wanted, because the good men went to the mines where they could get work.

Q. Did you have all your coal sold for the Sonman Company in the city selling agency, your own or other?

A. We didn't have a city selling agency at that time. I sold all the coal from Harrisburg. That was organized at a period I think after the period of this suit.

Q. Did you or did you not get anything for the selling end of it?

A. No, we sold it direct.

Q. Yours was a salary?

A. I didn't get a salary. Originally Mr. Cameron, Mr. Saxman and myself were the principal owners and since that time Mr. Neale and Mr. Thorn became interested in place of these gentlemen, and we never got any salary for our work. We did the work gratis.

85 Q. Were there many of these Baker-Whitely orders for which they supplied cars?

A. I have the record of the one that I remember distinctly and I don't remember the others specifically. I can't mention them, but I have the contracts with me in which we sold them the coal at \$1.35 in their cars, but Mr. Whitely and myself talked frequently over the telephone and a great many of the orders of that kind were arranged over the phone and placing of the cars.

Q. Did they in connection with these sales send you the shipping directions, or did you send it to them, send the coal to them somewhere?

A. I don't remember how the coal was billed. They would I think send us the shipping directions, I am not sure about that. They did both things. The coal brokers would do both ways.

Q. The Berwind-White order finally got up to 750 tons a day?

A. I think it did. I think that was the figure.

Q. Was that the top notch of their supply of cars to you?

A. I don't remember about that. I remember we would often give them special lots of coal in addition to the contract, provided we had transportation for them. Some periods in the summer months that every coal man knows that for a week or so there is often a flat soft spot in the coal market, which always occurs every year, and we did that with our customers, sometimes increase our tonnage over the contract.

Q. Were the Pennsylvania Coal & Coke Company cars furnished to you?

A. Yes, we took orders for the Keystone Coal & Coke Company and the Pennsylvania Coal & Coke Company and I think they both at that time were selling their coal to the Interurban Rapid Transit of New York. We couldn't bid on it because we couldn't
86 guarantee any shipments. We had to turn down business of that sort. So these middlemen took it and their coal was perfectly satisfactory and they were very anxious to get our coal for that contract because they had to have a high grade coal and, as I recollect it, they put in some of their cars to help fill out that order, but I couldn't tell the exact time. They may have been Webster cars. I know the coal was sold as Webster coal.

Q. That is all they supplied, and you supplied on others?

A. I think they sold as Webster coal. I think so.

Q. The orders you spoke of, Mr. McCormick, do you know of similar ones to any other company at the time those were given you you referred to here and on which you have established the prices mentioned on your memorandum?

A. The Central Iron & Steel Company I know had some orders with Berwind-White at the same time.

Q. That is, the order which was given you and unfilled was given somebody else or maybe several somebody elses that filled it?

A. No, we were shipping coal to them at the same time that Berwind was shipping to them.

Q. You each had an exclusive order?

A. We each had an order. Mr. Bailey explained that to us at a meeting at the time they inquired of us. They were sure of taking coal from Berwind and they had to take it as an insurance firm. That we heard frequently in the trade that we sold the coal, they asked us frequently whether we could deliver the coal and we had to be honest and many times lost an opportunity to sell coal at good prices.

Q. As a matter of fact aren't these letters of inquiry?

A. No, these were actual contracts, the ones I referred to yesterday. We shipped all the coal we received on those contracts pro rata. We had that experience in 1902. It was very fortunate
87 we did that, because people whom we sold coal to had resold it three times through different agencies, and the letter states came back like tumbling blocks and finally got to the man we sold to and he was stuck \$25,000, because we hadn't supplied him the coal, because we couldn't get the cars to supply it.

Q. That was before this action started at all?

A. Yes, but it taught us a lesson to deal out our coal pro rata, for we didn't want to discriminate against any of our consumers, so we always made that a fixed rule to divide up the cars we got among the consumers.

Q. In addition to those you designate as consumers you had other inquiries about your coal and prices?

A. Oh! yes, we had many inquiries about our coal.

Q. Were they written or were they telephoned?

A. There were lots of them written. A great many of them written. I have letters here. A great many telephone. I knew all the coal men in Philadelphia and I was down there and would

see them and they would talk prices and talk about contracts. I dropped into their offices. I always did that when I was in Philadelphia to keep in touch with the market. At that time we had many verbal conversations in regard to contracts for coal and I would frequently have to turn them down, I couldn't do it.

Q. Do you deal with all of these in making your expression in the way of inquiries and orders as orders?

A. No, not those inquiries. Of course, I had to tell them there was no use in our discussing making a contract, because these people wanted the coal. They could have used the coal. For instance a man would say he would take our entire output at \$1.35, provided we could assure him of a certain number of cars to make it worth his while to go around and sell the coal and have it delivered.

Q. In fact if all of the shippers could have answered yes to some inquiries made to you, would your orders have been that high?

88 A. What do you mean?

Q. If the shippers, the men who took the coal out or who sold the coal that was taken out could have guaranteed, as you speak of, all the inquiries or orders they might have received, would there have been as many?

A. As many orders?

Q. Yes?

A. I don't mean it in the sense of guaranteeing the entire 40 cars a day, which was our capacity, but a reasonable supply of cars.

Q. Now if you could have guaranteed and had a reasonable supply of cars, nobody else would have got the order for that coal obviously. Isn't that correct?

A. A great many shippers of coal would have waited until our orders were placed, because we had the best grade of coal and it was always taken up. There is not more than half a dozen shippers of our grade of coal, and the consumer wanted to get our coal first and he was willing to contract for it by the year and he was willing to pay a little better price for it, providing he was sure of getting his fuel. It wasn't a speculative coal we wanted to dump into the market at a boom period, it was our price of contract coal for the year, and that is the reason we went into it. That coal was always, as any coal man can tell you, taken up and sold.

Q. Any order which you got and accepted and filled that ended that order as far as any other shipper was concerned, didn't it?

A. I should think so, if it was consigned to a particular place.

Q. If another shipper got an order and shipped the coal, that ended that one, didn't it?

A. A particular pace, yes, to a particular consumer. Of course, lots of consumers bought coal from different men. If they wanted 100,000 tons, they might buy 20,000 from five different persons.

That is possible.

89 Q. When the consumer got the 100,000 tons the order business was ended?

A. Yes, for that particular order.

Q. If that represented all the consumption from the region here in Pennsylvania, that ended the sale?

A. Yes sir.

Q. If two men were shipping coal and the one filled the orders, the other had no orders because the consumer was supplied?

A. There was never a question in the coal market about there being a demand for this particular grade of coal because there was so little of it. That affected the cheaper grade of coal.

Q. If there were two of you and you supplied it, the other man was without orders for that consumer?

A. With that particular consumer. There are plenty other consumers.

By Mr. BIKLE:

Q. If every operator dealing in the same coal that you were operating had been able to assure these middlemen or the consumers of full and regular deliveries under the contracts which might have been made, would the prices have been as good as they were?

A. Mr. Bikle, that is just what we went into this mine with that object.

Q. Now just wait?

A. I am going to answer your question. That is just exactly the condition we wanted. We wanted to get all the cars we could get, we were satisfied low prices, but we were going to make our money on a big tonnage, because we had the best grade of coal in Pennsylvania. The fellows that would have suffered under your theory, because you gave all the consumers plenty of cars and all the coal they needed the price of coal is going down, is to my mind the wrong theory for the Railroad Company to work on.

90 Q. In the first of all, when you say that you have excluded the Clearfield coal?

A. There is so little of the Moshannon left here.

Q. Let us consider the coal you were mining and the operators who were mining that same coal. Now assuming that all those operators would have made guarantees of complete deliveries under such contracts as were offered to you, you admit there are other people mining your grade of coal?

A. How many I ask you?

Q. One half dozen you say?

A. Yes sir.

Q. Do you think the price would have been what it was?

Mr. LIVERIGHT: We object to the question, for the reason it is based on assumed facts not in the proofs at all, about orders to the other operators and supply of cars they had and various other facts that are hypothetical.

A. Let me answer it. Most of the other operators mining this kind of coal were getting not all the cars they needed but a great deal more cars than we got and we heard from our customers, they say there is so and so.

By Mr. BIKLE:

Q. As you just now stated, they weren't getting all they wanted. These other operators, you say, they had a shortage, too. Now I want to assume simply that every operator of your grade of coal bring it down to your own basis, could have guaranteed full deliveries through the year, don't you know that would have brought the price down?

A. No, not enough of it to affect the market. I don't think there is enough, because Berwind, who is one of the big shippers of that kind of coal, was getting nearly his entire supply and he was the biggest shipper of that kind of coal.

91 Q. Wasn't the prices held up for that coal because there was a shortage?

A. No, our coal wouldn't have affected the general market conditions of coal, because there is not enough on the market.

Q. Do you mean to say that if these other operators, six other operators, had produced their full output and you had produced your full output and Berwind had produced his full output, there wouldn't have been a great many more tons of that coal go on the market?

A. It would have been absorbed.

Q. But there would have been a great deal many more tons of coal go on the market?

A. Certainly.

Q. And you mean to say those thousands of additional tons of coal would all have commanded in your best judgment the same price?

A. I think if you get the Columbia Coal Mining Company's books and the Logan—

Q. No just wait?

A. Now these are the six shippers.

• Q. I want to know whether in your best judgment all those thousands of tons of coal wouldn't have affected the price?

A. No sir, I don't think so. The reason is simply this. Out of eight to ten millions of coal say shipped on this road, if that is the tonnage, the amount of coal that is shipped by these six, say that number, I don't know exactly about the half dozen, would not affect the general market conditions, because the tonnage they ship and which is a special coal and which is taken up by the same people year after year, who know it and have contracts from the first of April to the next first of April at fair prices, that wouldn't affect the general market. The biggest shipper of that coal is the Berwind-

92 White Coal Mining Company and they got their cars during this period. There you eliminate the biggest tonnage of the six and leave the other five smallest shippers.

Q. If that does not affect the price of coal, how do you explain the contract price of coal, as testified by you, fell from \$1.75 for the year April 1st, 1903, to about \$1.35 for the year beginning April 1st, 1904. Why was that?

A. Well at a great period of shortage then the price of this particular coal jumped away up. During the strike it went up to \$5 or \$6 a ton, during the latter part of 1902. It was up to \$1.85 or

\$2 a ton, but my theory is this coal should be sold at contract prices. The price of contract coal did not go down during those periods. I don't believe the price of this coal that Columbia and Henrietta shipped on their contracts dropped below \$1.35 in any of those years.

Q. I asked you to explain why the price fell from \$1.75 for the year beginning April 1st, 1903, to \$1.35 for the year 1904. Wasn't it because the car shortage wasn't as bad as it had been?

A. Naturally the price from \$1.75 dropped from a strike period of 1902, which was abnormal. It was perfectly natural when the Railroad Company had an adequate supply in 1904 and 1905 the price wouldn't be \$2.00.

Q. Isn't this true. That if mines selling other grades of coal than yours, even lower grades, reduce the price, your price necessarily falls somewhat, because consumers will not pay \$1.75 for your coal, if coal of a lower grade is selling say for \$1.00 a ton?

A. That is true. For instance, ourselves we had to sell coal at prices below \$1.35 during the summer months. We had spot coal we couldn't contract for before the first of April, which was the period when all these contracts are renewed from year to year and we had extra coal to sell because on account of the flood or other reasons we were not able to contract it. When we had to go out in the summer months in competition with cheap coals it naturally affected a small amount of this tonnage, but that is not the way this coal should be sold.

Q. But, as I understand you to say, the usual differential between your coal and the other coals you regard as inferior is about 25 cents a ton?

A. Yes sir.

Q. So that the decrease in the price of the other coal reflects itself on your prices?

A. Not on contract coal.

Q. Would it affect it for the next year?

A. Spot coal sold during the soft months it would naturally affect it.

Q. Turning to the question previously put, suppose there were such a car supply that any operator could guarantee any amount of deliveries and could assure his customers an absolute delivery in accordance with those contracts, wouldn't that decrease the price of coal generally.

Mr. COLE: I think we have gone far enough in this theory. We have got all the facts. This is a theory not relative to this case and we object to it on that ground.

Mr. BIKLE: The purpose of the offer is to show that had the conditions existed which this witness claims could have existed, to wit, had the Railroad Company been in a position to give to every operator all the coal cars that under any circumstances he would demand, the price of coal would have been much less than it actually was. For the purpose of showing that these prices are intimately bound up and connected with the car shortage and that therefore

damages based on the theory of an absolute complete supply cannot be measured by the prices prevailing at the time of the car shortage.

Mr. LIVERIGHT: Objected to further for the reason it is an attempt to interject the defense into the cross-examination of the witness, and for the further reason that the questions are argumentative and manifestly offered on the part of the Counsel to hold a debate with the witness.

The COURT: We will hear the answer and note an exception for plaintiff and seal a bill.

A. If all the operators you mean had all the cars they wanted to ship to their customers?

By Mr. BIKLE:

Q. That is, if the price of coal was determined absolutely on the question of supply and demand without reference to supply of cars?

A. Yes, that might automatically affect the supply of coal naturally, but the policy of a railroad company adopting that policy of curtailing car supply to keep up prices of coal and affects the general business of the community and State, that is, it is artificial and that thing is not a proper economic law and it works out to the detriment of the business and ultimately to the detriment of the coal man, and our theory is we would rather have that condition and have had from 1899, when we started, because we would be in better condition today, after 12 or 13 years, than going through this condition of cars which was artificial.

Q. I don't want to argue that?

A. That has all to be taken into consideration.

Q. If that condition is artificial, as you say, and the price is an equally artificial price, that is true?

A. Well it is the market price today that is what the price is. The price is a fact. The question of making cars short is artificial. The price is what you are up against.

Q. And the car shortage enters into your price, that is one of the determining elements?

A. The railroad worked on that theory.

Q. The railroad doesn't do it for that purpose, as you know?

A. I don't know it doesn't do it for that purpose. I believe that to be a fact. I positively state that. I have argued that question with too many railroad officials.

95 VANCE C. McCORMICK recalled on part of plaintiff:

By Mr. LIVERIGHT:

Q. I have handed you a file of correspondence. What is that?

A. Those are orders that we entered contracts for coal during the period after April 1st, 1903 and up to 1907 I think.

Q. Do they cover all the inquiries you had for Sonman coal?

A. Oh no, not by any means.

Q. What other inquiries were there than those?

A. Well we had a number of inquiries for coal and a number

of offers for coal which we could not accept because our car supply didn't justify.

Q. Are these the accepted and booked orders that you have before you?

A. I haven't had time to go over all of them, but I think they are. All I have looked at here. I haven't examined them carefully.

Q. With what concerns were those orders made?

A. Keystone Coal & Coke. Charleston Consolidated Gas, Railroad and Electric Company. Central Pennsylvania Traction Company. Bituminous Coal Company. R. Powell & Company. Madiera-Hill & Company. Berwind-White. Saxman Flour & Feed Company. Law, Fisher Company. Pennsylvania Coal & Coke. Pennsylvania, Beech Creek & Eastern. Madiera-Hill.

Q. Do you have them summarized there?

A. I have them summarized here?

Q. Will you give the summarized statement?

A. 1903 to 1904, Keystone Coal & Coke Company 12,000 tons at \$1.75. Pennsylvania Glass Sand Company 10,000 tons at \$1.75. Central Iron & Steel Company one car a day at \$1.75. Charleston Consolidated Railroad, Gas & Electric Company 5,000 tons at \$1.75. Harrisburg Traction Company one car a day at \$1.75. James Boyd & Company 15 cars per day \$1.75. Clark Thread Company 1000 tons at \$1.50. That is the order contracts we have on our books from April 1st, 1903, to April 1904. I think it totals up 164,500 tons.

By the COURT:

Q. All at \$1.75?

A. All but the Clark Thread Company 1000 tons at \$1.50.

By Mr. LIVERIGHT:

Q. In that period was some of the \$1.75 contracts revised by you voluntarily?

A. On November 4th we reduced all our contracts to \$1.50.

Q. For the balance of the coal year?

A. All the \$1.75 contracts were revised to \$1.50 for the balance of the coal year, up to April 1st, 1904.

Q. Proceed with your 1904 and 1905?

A. April 1st, 1904 to 1905, Keystone Coal & Coke Company 90,000 tons \$1.25. The Charleston Consolidated Railroad, Gas & Electric Company 7500 tons at \$1.35. George B. Newton & Company 4000 tons at \$1.30. Pennsylvania Glass Sand Company 10,000 tons at \$1.25. Central Iron & Steel Company one car a day, amounting to 7500 tons, at \$1.35. Harrisburg Traction Company 7500 tons at \$1.35. Making a total of 126,500 tons. Now during that period, the latter part of it, we had our flood. We weren't mining coal till the middle of the summer of 1905. Then we took on contracts for the Charleston Consolidated at one cargo per month at \$2.45 f. o. b. Greenwich.

Q. Where is Greenwich?

A. Near Philadelphia. It is the shipping point where the vessels are loaded.

Q. Philadelphia Harbor?

A. Philadelphia Harbor. It is where all the coal is shipped from that goes by tide from there. It was shipped from there to Charleston.

Q. You say your sale was f. o. b. Greenwich?

A. Greenwich. September 1st Keystone Coal & Coke 500 tons at \$1.20. Pennsylvania Railroad Company for smithing coal at \$1.25 net tons, 50 tons a week blacksmithing coal.

Q. These other prices you have given are net or gross?

A. The other prices I have given are gross tons. We usually sell gross tons f. o. b. cars at the mines, except to the Railroad Company and some other few orders we sold net. I think smithing coal was net to other people. February 3rd, 1906, Central Iron & Steel Company 10 cars a week at \$1.25. May 22nd, 1905, Central Iron & Steel Company one car per day \$1.25. August 23rd, Central Pennsylvania Traction Company 200 tons a week at \$1.10. August 23rd, Central Pennsylvania Traction Company after September 1st \$1.20. August 29th, Central Pennsylvania Traction Company 100 tons per week \$1.10. August 10th, Keystone Coal & Coke Company 1500 tons per week at \$1.15. August 21st, Keystone Coal & Coke Company one steel per day \$1.10. American Pulley Company 2000 tons \$1.25. Now the contracts covering the period from April 1st, 1906, to April 1st, 1907, Bituminous Coal Company of Philadelphia 1800 tons at \$1.25 net mines. Central Iron & Steel Co. 15,000 tons \$1.30. Keystone Coal & Coke Company, South Amboy, 50,000 tons at \$1.20. Keystone Coal & Coke Company, Philadelphia, 31,200 tons at \$1.20; 17,000 tons at \$1.20. Staples Coal Company, Philadelphia, 10,000 tons at \$1.25. Charleston Consolidated Railroad, Gas & Electric Company 5,000 tons at \$1.30. They recontracted in October for 12,000 tons at \$1.35. Williams, Wells & Company 13,500 tons, this 15,000 stricken out made 13,500 in pencil, at \$1.25. The Williams, Wells & Company contract was New York, New Haven & Hartford cars being placed at the mines.

Q. Up to what date does that take you?

A. That takes us up to April 1st, 1907.

Q. On what basis was the sale to Keystone Coal & Coke Co. for South Amboy, made by you? What was the price?

A. The price was made \$1.20.

Q. Where?

A. F. o. b. cars at the mines.

Q. Is that the way you made that sale?

A. The way we made all our sales to Keystone.

Q. Had you been able to contract for your entire output do you know whether you would have gotten any different prices than those?

A. We certainly could have gotten much better prices than these.

Q. How much?

A. Well we could unquestionably have gotten the same price

as our competitors of this same grade of coal on their contracts for those years, which ran from \$1.35 up to \$1.45.

Q. For the entire year?

A. For the entire contract year. We were never able to enter into contracts of that kind except — a speculative nature.

99 For instance, Keystone Coal & Coke Company had contracts with us for five cars per day, which we could not fill, and they knew that. In fact they were threatened with suit on account of that contract for non-delivery of the coal, which was not our fault but fault of the Railroad Company. After that time they bought coal as a speculation. They had other mines of their own and handled a great deal of coal and bought this coal from us to speculate with and therefore paid very low prices because they expected to sell it from month to month, because they couldn't do it on contract orders. That was our whole difficulty during the entire period. After the flood, we had to jump in, and we got some low prices on soft coal during the low summer months, but if we had been able to have had a steady supply of cars we could have contracted for our entire output before April 1st of each year and had regular customers who would have taken our coal year after year as they did with a few competitors as to this grade of coal.

Q. From whom did you have inquiries?

A. We had inquiries from W. H. Pifer Company, who was a neighbor of ours who had sold his entire output of this same grade of coal and repeatedly asked us for coal, and we sold him some and we couldn't deliver the coal on account of the poor car supply and he threatened a suit. He got very ugly about it and he came back again at us for the next year and wanted us to contract for the year and we explained to him our troubles, he thought we were giving coal to other people and not shipping our proportion to him. That is what made him mad. He thought we had been selling it and getting higher prices and we assured him we divided our entire—

Mr. O'LOUGHLIN: We submit this is not any part of this case.

100 By Mr. LIVERIGHT:

Q. Don't go into details.

A. We turned down orders from Piper & Company because we couldn't get cars.

By Mr. O'LAUGHLIN:

Q. Give us where they are?

Mr. LIVERIGHT: Only the location of the Piper Company?

A. It is just in the rear of our property, south of it.

Q. The business address?

A. Philadelphia.

Q. For how much tonnage was the Pipe- Inquiry?

A. Why here is one letter of March 30th 1903.

Mr. O'LAUGHLIN: That we object to as being incompetent.

A. This is a direct offer to purchase a certain amount of coal per month.

Q. All right.

A. What will you ship us 2500 tons coal per month, commencing with 1st of April and delivering the goods. Nothing to occur like the past year. Yours truly, W. H. Piper & Company. That was an inquiry for 2500 tons a month that we turned down and told him we couldn't in justice to ourselves or him. March 30th, 1903, Baker-Whitely & Company, from Baltimore, wrote a similar letter and we answered that on April 2nd, 1903.

By Mr. LIVERIGHT:

Q. For how much did they inquire?

Mr. BIKLE: We object to that feature of the testimony, an inquiry from Baltimore. It raises the question which the Court knows is involved in this issue and on which at this point
101 we ask briefly to present our views and have a ruling.

We object also to the testimony of the witness as to shipments or sales for delivery at Greenwich to go to points beyond in another State, and also to all testimony of the witness which may relate to sales of coal for shipment beyond the State of Pennsylvania or to persons living out of the State of Pennsylvania.

By Mr. LIVERIGHT:

Q. For what delivery was that inquiry?

A. They had an office in Philadelphia. He wants us to talk to Mr. George E. Scoot, 26 South Fifteenth Street. This is in regard to Philadelphia business, this inquiry.

By Mr. BIKLE:

Q. Do you mean coal shipped to Philadelphia?

A. Yes, through their Philadelphia office.

Q. To Philadelphia?

A. To Greenwich.

Q. For delivery beyond?

A. Yes, we deliver it f. o. b. cars at the mines. We sell it at the mines f. o. b. cars.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

By The COURT:

Q. The coal that went to Greenwich to go to Charleston was that a sale f. o. b. at the mines also?

A. F. o. b. at the mines. I think the one contract was f. o. b. at Greenwich, I think I read that.

By Mr. LIVERIGHT:

Q. Do you know how many tons were covered by that particular contract?

102 A. One cargo a month. That would be, the cargoes vary in size, 700 to 1000.

Q. Approximately 10,000 tons a year?

A. Approximately, yes, but that only began in June and I will get the correspondence and see exactly what it is.

Q. In June of what year?

A. June, of 1905, after the flood.

Mr. O'LAUGHLIN: We object to the testimony relating to the sale of coal to Baker-Whitely Company, which was sold f. o. b. Greenwich for the reason given already.

Mr. LIVERIGHT: That is a mistake. That wasn't the Baker-Whitely contract at all.

Mr. O'LAUGHLIN: I mean the one going to the Charleston Consolidated Gas, Railroad & Electric Company, for the reason that after reaching Greenwich it was shipped to the State of South Carolina and therefore it would be incompetent, irrelevant and immaterial.

By Mr. COLE:

Q. Do you say Greenwich is considered a Pennsylvania delivery?

A. It is.

By The COURT:

Q. You state that coal to be delivered by you at Greenwich was to be placed on board a vessel to go to Charleston, is that right?

A. That isn't in the contract, no. The contract reads, we have entered your order in accordance herewith for your supply of coal until April 1st, 1906, at \$2.45 per gross ton f. o. b. cars at Greenwich. We will ship one cargo beginning with July. That runs up to the first of April. They could have done anything they pleased with that coal after that.

103 Q. You have no relation to that coal after it reaches that point?

A. No sir, none at all.

Q. And don't care where it goes?

A. We don't care.

By Mr. LIVERIGHT:

Q. To whom was it consigned by the mines?

A. We either consigned the coal to Keystone Coal & Coke Company or James Boyd & Company. We had a shipping arrangement with those men who secured the schooner upon which to put the coal, and I don't remember at this exact period, either one of these concerns handled that for us.

Q. After it got to Greenwich you had nothing whatever to do with the handling of it?

A. Nothing whatever. We gave these agents a commission for putting it on the schooner for us and we had no further responsibility with it. I don't know where it went. I presume it went to the proper destination wherever they wanted it to go.

Q. That is, the bill was made out to Keystone Coal & Coke Company of [or] James Boyd & Son at Greenwich?

A. I think so. I will have to look up my records.

Mr. O'LAUGHLIN: We move to strike the testimony out which relates to the sales of coal which were shipped to Greenwich for South Carolina point of delivery, for the reason it is interstate commerce and is not a subject to be inquired into in this action, and for the additional reasons given, because it is incompetent, irrelevant and immaterial.

Q. Who is your inquiry you are testify- to from?

A. From Mr. Gadsen, President of the Charleston Consolidated Railroad, Gas & Electric Company.

104 Q. What does it say?

A. Confirming our understanding when I was in Harrisburg, I write to say we will enter into a contract with you for our supply of coal until April 1st, 1906, \$2.45 per ton f. o. b. Philadelphia. You can arrange to ship us one cargo a month beginning July. Yours truly, F. P. Gadsen.

The COURT: Objection overruled, exception noted for defendant and bill sealed.

By Mr. LIVERIGHT:

Q. For how much did they inquire?

A. I have no record here of any specific tonnage. They inquire frequently for considerable tonnage of coal. We have some correspondence here. A good deal of it was with Mr. Whitely over the telephone.

Q. Did you have a number of other inquiries, without going into the details of them?

A. We had a great number of inquiries from all the coal men. We were known to them. I had been in all their offices and they knew the Sonman coal, and we had frequent inquiries over the telephone and by letter, and all of them were familiar with our situation and we had their sympathy.

Q. Did you have any arrangements with the representative of Ernest Law & Company?

A. We did.

Q. With reference to what?

A. We had a number of inquiries from them and we sold them some coal, and some coal contracts we had to cancel because we couldn't ship them the coal.

Q. Did you have any negotiations with them in regard to your entire output for any particular year?

A. We did.

Q. What year?

A. Mr. Jacox, the coal man of Ernest Law & Company wanted to buy our output, handle our output and we couldn't go
105 into an arrangement of that kind with anyone because we could not assure them of a reasonable delivery.

Q. What year?

A. I think it was 1905 or 1906, I am not positive.

Q. Was there any other person or firm for any other year wanted to deal with you on the same basis?

A. Hilling & Crane would have liked to bought our output, and Percy Madiara of Madiara-Hill & Company, who was also a stockholder, would like to have taken it and enter contracts for all our orders, and the Keystone Coal & Coke, Mr. Robert Cassatt, talked to me a number of times about taking our output.

Q. Did you close with any of these people?

A. We couldn't close with any of them.

Cross-examination.

By Mr. O'LAUGHLIN:

Q. As to the Charleston order, was that run of mine coal?

A. Run of mine coal.

Q. The first letter you referred to says it was three fourths screen coal, at the price you testified?

A. We didn't say that. In the south they call coal by different names, being a different system of grading and they may have mentioned it three fourths screen. We had no grades.

Q. The testimony you gave says the price fixed is for three fourths screen coal, does it not, on the letter you referred to?

A. The one we had?

Q. Yes?

A. I don't remember.

Q. The one from which you testified and fixed the price at \$1.75?

A. No, not this letter confirming our understanding.

106 Q. The one for 1903 and 1904 was what I referred to?

A. This was for 1905.

Q. I don't mean that?

A. I haven't that letter. I remember in one letter they referred to it as run of mine coal. I mean as three fourths coal in one of their letters. Here is a letter Mr. Cameron wrote, dated March 30th. We note in accepting our proposition you refer to the coal as three fourths screen. As a matter of fact the coal is not screened at all, and we have no doubt it would be adapted to your purposes without being screened.

Q. The letter you referred to was \$1.75 and that referred to three fourth- screen, fixing that price?

A. We never sold any as screened. We shipped it from the tipple into the car.

Q. Did you or did you not get \$1.75 for the Charleston coal in the year 1903 and 1904?

A. We did until November, when we reduced the price to \$1.50.

Q. In reaching the total for 1903-4 did you count the tonnage from the date of orders until April 1st, 1904, if the orders came in after April 1, 1903?

A. Why Mr. O'Laughlin this total tonnage at 164,000 tons I have here was calculated by Mr. Anver.

Q. Is that not for the whole of the year?

A. That was tonnage for the whole of the year, the coal year of April 1st, 1903 to April 1st, 1904.

Q. In other words, the Pennsylvania Glass Sand order, to which you referred, is a daily order?

A. No, the Central Iron & Steel Company is a daily order.

Q. The Pennsylvania Glass Sand?

A. There was 10,000 tons at \$1.75.

Q. The Pennsylvania Glass Sand order on the piece of paper from which your table is calculated is a daily order. It is not an annual order?

107 A. You mean the contract?

Q. Yes?

A. It is not on this record.

Q. I just want to find how you calculated it in using it as an illustration?

Mr. COLE: How is it very material whether it is a daily or weekly or monthly order. We object to this as immaterial.

A. I can't find that contract now. I think you saw it yesterday, it was with the other contract. I will look for it.

By Mr. O'LAUGHLIN:

Q. Just as explanatory, what did you reduce the Harrisburg Traction Company to as a weekly order, what did you call it as tonnage. You have it on your summary?

A. The Harrisburg Traction Company was \$1.75 for a car a day. We reduced it to \$1.50.

Q. I mean number of tons. It was a weekly car?

A. We had that 750 tons and we have the Pennsylvania Glass Sand 10,000 tons for the year.

Q. Was the Clark Thread one for a flat tonnage order at \$1.50?

A. It was a flat tonnage order. That was my cousin's thread mill.

Q. In reaching a price on your letter, the Charleston Company's price in the letter [is] \$2.95. Your testimony is as to another figure?

A. I think the later order in 1905 was \$2.45.

Q. Well now your testimony is as to other figures?

A. That was the only time we sold it in that manner. I think before we sold it always f. o. b. cars at mines and the first order we sold it was \$1.75 f. o. b. cars at the mines 5000 tons \$1.75 f. o. b. mines.

108 Q. The first order reads on the letter \$2.95 a ton, the order itself. Your testimony is \$1.75. Now tell us what you do to get it to \$1.75, that is what I want to get at?

A. Mr. O'Laughlin, while you are looking, here is this Penn Glass Sand Company and our answer March 15th, 1904. In regard to the price of coal for the coming year will say we will quote you 10,000 tons for the year at \$1.35. That was for the succeeding year.

Q. If during the year April 1, 1903 to April 1, 1904, you had had sufficient cars to ship 16,080 tons per month from your orders that you have gone over and inquiries, what proportion of that part would have been consigned out of the State to persons to whom it was sold; what proportion of the additional tonnage over and above the actual shipments would have gone out of the State?

A. I don't know anything about the Keystone Coal & Coke Co. shipments, 12,000 tons, I don't know where that would go.

By Mr. LIVERIGHT:

Q. Who gave the shipping directions for that?

A. The Keystone Coal & Coke, Mr. Cassatt. Pennsylvania Glass Sand was in Pennsylvania. Central Traction Company was in Pennsylvania. The Charleston Consolidated we sold f. o. b. cars at the mines or Greenwich. The Harrisburg Traction Company was in Pennsylvania. The James Boyd & Company I don't know where they went. I know where some of them went. The American Pulley Co. and a lot of them were in Pennsylvania. James Boyd & Company gave us shipping directions for all their coal. We sold it all f. o. b. mines. Clark Thread Company 1000 tons was out of the State.

By Mr. O'LAUGHLIN:

Q. Having in mind all those orders and inquiries you had for your coal, can you reach a percentage or an estimate the
109 best you can make as to what part of it would have gone out of the State, if you had got enough cars to ship 16,080 tons a month?

A. I really cannot, because out of the 164,000 tons 125,000 tons were shipped through coal brokers and I don't know where it would have gone to, I have no idea. The balance was all orders we took and 5000 tons of that we shipped to Greenwich and sold f. o. b. cars at the mines, and I suppose 125,000 tons were sold to brokers and all the rest practically we delivered within the State.

Q. There would have been some coal, in addition to that which you have spoken about specifically from your paper, to ship?

A. Well I have no doubt that we took orders during some of the months in addition to these contracts, although I would have to look up my records on that, but our coal sold on orders were all sold f. o. b. cars at the mines.

Q. From the whole of the orders that you did supply and from those you there have in front of you on that paper referred to, can you give an estimate of what proportionate part of it went out of the State?

A. I cannot.

Q. Or what proportionate part, if you had all your hypothetical question, 16,080 tons a month, would have given you?

A. I cannot tell what proportion would have gone out of the State.

Q. Would it be a quarter of the whole output?

A. I couldn't estimate that.

Q. Under or over that?

Mr. LIVERIGHT: He said he can't estimate that.

The COURT: It can't be material any way.

110 By Mr. O'LAUGHLIN:

Q. Well have you made a total, as well for 1905-6 as you did for the other years you have testified to from the statement you have in front of you?

A. 1905-6? That is from June, 1905, to first of April. I haven't a very accurate total here. I have from June, 1905, to June 1906.

Q. That doesn't give us the coal year?

A. No, the coal year was upset on account of our flood. We had to begin selling coal in the middle of the summer and we had to take contracts at that time at great disadvantage to ourselves for different periods, because people were all taken up and some of these run for different times.

Q. Can you give us, from your knowledge, an idea of what would have been the proportionate part of it up to April 1, 1906?

A. Really I could not unless it was a very careful calculation.

Q. Would that same thing hold true as to the year April 1, 1906 to April 1, 1907?

A. No, I have the whole calculation there. I have 143,500 tons.

Q. In that last year mentioned the second item on your statement is one steel a day. What do you call that in tons for the year?

A. Why we would figure that 15,000 tons a year.

Q. And the fourth one is 600 a week?

A. We figured, that is the Keystone Coal & Coke Company, 31,200 and 17,000 I have here. That is a total of 48,200.

Q. Where is the Williams, Wells & Company people, where is that firm?

A. I will look up the correspondence and see where the headquarters are.

111 Q. Of the coal which you figured on from the amount you actually got in these years up to the 15,000 or 16,080 a month which is for the cars you did not get, would not some of that have gone out of the State?

A. You mean of the coal I didn't sell?

Q. Yes?

A. I couldn't tell.

Q. You are testifying as to orders for it and inquiries for it?

A. You mean of the inquiries for it. Well it is very hard to tell. Baker-Whitely & Company, for instance, they might have ordered all that coal shipped through their Philadelphia office. He referred me to Mr. Scott. They were interested in both Puritan and Stinemann at that time. Ernest Law & Company, all their business was in the State. They had large customers in the State. We sold all that coal to those consumers f. o. b. mines. For instance, Ernest Law & Company and Keystone and all these other concerns would use the coal on the Rapid Transit, New York City.

Q. The question was as to its destination?

A. We would have to take that from their shipping directions. We would sell all coal at the mines.

Q. The men or the firms you have mentioned the coal sold to them you were given shipping directions for, were you?

A. Yes sir.

Q. The person and destination mentioned in the shipping directions is where it was shipped and that you manifested it for the Railroad Company?

A. We shipped it to the point designated by the purchaser of the coal.

Q. Were there not some part of that to places out of the State?

A. Yes.

Q. And as to the supplemental cars that you didn't get and that the testimony has been about, that is, the difference between
112 those you actually got and the 16080 tons, would have been treated in the same way, would it?

A. I think no doubt we would have received shipping directions for some coal to have been shipped outside.

Q. You don't know yet about the Williams, Wells & Company. Do you know the State or town?

A. I really don't remember it and every consignment of special cars from the mine. They were either a New York or New England firm. As I remember, we sold the coal to be delivered on special cars they placed at the mines and we weren't interested after that.

Q. These orders you have testified to were they all accepted by your Company, the specific ones you enumerated the tons of and names of and prices of?

A. Yes, I think we have acceptances all here. I think you saw all the correspondence, all our contracts. I think all were accepted and we shipped on them when we got cars.

Q. Were they by you, after their acceptance, because of any reason cancelled or killed?

A. Well I don't remember that we cancelled any, but I remember that a great number of our customers cancelled a lot of them because they had to have the coal and could buy coal elsewhere.

Q. These people?

A. A lot of these people. I can read you voluminous correspondence on the subject, if it is permissible.

Q. I have got all I want in that. You testified to one South Amboy contract. Was that the only one you had?

A. We had shipping directions for a good deal of coal to South Amboy I think.

Q. In New Jersey?

A. Through the Keystone Coal & Coke, yes, in New Jersey, and other shippers. We shipped it wherever they told us to ship it.

Q. A good deal of it went to South Amboy?

A. A good deal of it went to South Amboy.

113 VANCE C. McCORMICK recalled on part of plaintiff.

By Mr. COLE:

Q. Mr. McCormick, have you a statement prepared of the amount of your claim?

A. I have.

Q. Will you tell us what you claim here your damages to be?

Mr. O'LAUGHLIN: We object to this as incompetent, irrelevant and immaterial.

Mr. BIKLE: To exhibit No. 34 the defendant objects for the following reasons:

1. The column thereof relating to the cost at which it is alleged coal would have been produced with what is designated an adequate car supply is an unproved fact, one of the facts for the jury to pass upon, if any portion of this part of the plaintiff's claim is recoverable in this action.

2. The same objection with respect to that column of the statement entitled loss per ton.

3. The whole statement is objected to on the ground that the plaintiff is not entitled to recover in this action for any loss which it may have sustained by reason of the fact that the cost of mining at its mine may have been enhanced due to the fact that it did not receive more cars for the shipment of this coal than it actually did receive.

4. That the first column relating to gross tons mined does not indicate the amount of this tonnage which was consigned to points outside the State of Pennsylvania:

Mr. BIKLE: With regard to statement No. 33, the defendant objects to this statement:

1. For the reason that the column relating to the rating for the month in gross tons as fixed by the defendant is irrelevant
114 and immaterial, in view of the evidence uncontradicted that in most of the months the plaintiff did not order cars equal to its rating.

2. Because the column referring to the actual coal produced and shipped f. o. b. cars at the mines is not limited to shipments consigned to points in the State of Pennsylvania.

3. Because the column entitled tonnage not shipped f. o. b. cars at mines through shortage in car supply is an unproved deduction, based on inadequate facts, since it is based on the theory that there would have been a shipment equivalent to the difference between coal produced and the amount determined by the rating for the month in gross tons as fixed by the defendant, when the evidence shows that for most of the months the plaintiff did not order cars equivalent to the rating of its mine as fixed by the defendant.

4. Because the column entitled the average market price per gross ton takes into consideration prices which are inadequate to fix the price at which the plaintiff could have sold any additional tonnage which it might have mined.

5. Because the cost per gross ton is an unproved fact. A statement supported, as appears on this statement, with respect to the period from April 1903 to September 1904, would be no evidence, the estimated cost being different from that given by any witness.

6. Because the loss per ton is a calculation based on inadequate data already referred to.

7. Because the damages claimed are based on inadequate data already referred to and are not restricted to possible shipments of which there is sufficient evidence.

8. Because the damages demanded are, on the whole, speculative and impossible of accurate ascertainment.

The COURT: We will overrule the objection and note exception for defendant and seal bill.

115 Mr. LIVERIGHT: Plaintiff offers a statement to accompany the damages statement already offered, which was designated as No. 33, showing plaintiff's claim based on actual tonnage ordered or for which requisition was made in gross tons. (Paper marked Plaintiff's Exhibit No. 33A.)

Mr. BIKLE: The defendant objects to Exhibit No. 33A for the same reasons referred to with reference to No. 33, so far as the same are applicable. And for the further reasons:

9. That this Exhibit is not supported with respect to the cost of production and the supposed loss per ton by any evidence so far as concerns those months in which damages are claimed on a lower basis than 16080 tons during the period from May 1903 to November 1904 inclusive, and on 15000 tons during December 1906 and January 1906, and on 16896 tons during February and March 1906 and for July, 1906.

For the further reason that the tabulation evidences on its face a hypothetical estimate of the additional tonnage which would have been shipped, in view of the fact that whereas on Exhibit No. 33 the hypothetical tonnage is stated at certain figures and in the present Exhibit it is in certain months stated in different figures.

The COURT: We think the tables are for use to the jury, they being the judge of the facts and this being a method of getting at an estimate of the compensation which they are to be allowed, if any, for the alleged wrongs. The objections are overruled, evidence admitted, exception noted for defendant and bill sealed.

By Mr. COLE:

Q. Now, Mr. McCormick, based on your rated capacity, if you had received all the cars that your rating entitled you to what would be your damages?

116 Mr. BIKLE: I must object to that. That is what appears on the paper and what is for the jury to determine under all the evidence in this case. Now it certainly isn't relevant for Mr. McCormick to be the sole juror.

The COURT: I think that is competent. Exception noted for defendant and bill sealed.

A. Damages for the loss of profits in coal not shipped f. o. b. cars at the mines \$144,258.35.

By Mr. COLE:

Q. How much damage do you claim on the coal mined and shipped by reason of the excessive cost of producing so small an amount?

Mr. BIKLE: Same objection to this I originally made to the tables.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

A. \$42,929.80.

By Mr. COLE:

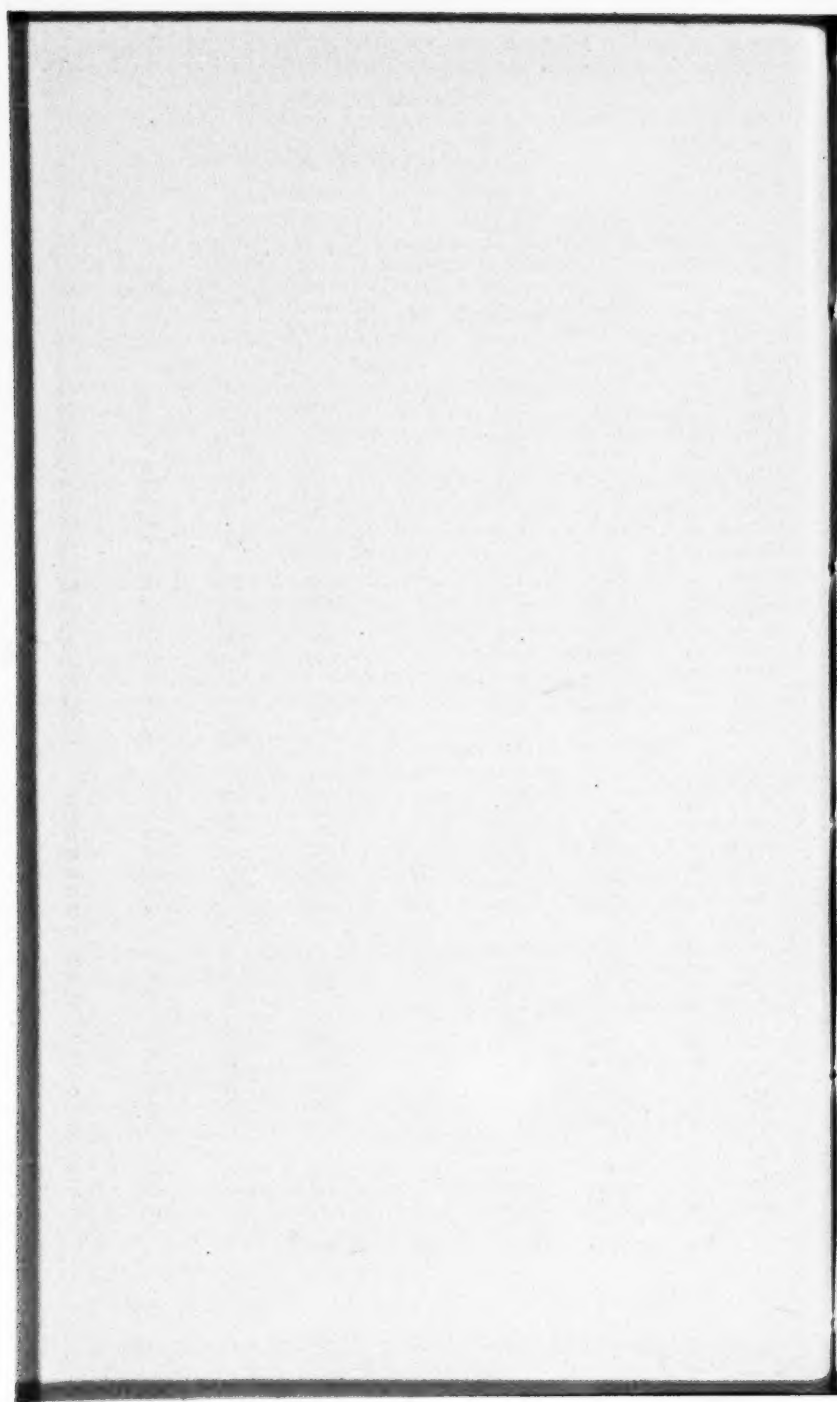
Q. Based on the calculation of the number of tons that you ordered for shipment, what would be your damages?

Plaintiff's Exhibit No. 33

(Copy of Plaintiff's Exhibit No. 33.)

Year Month	Work- ing Days	Rating for month in Gross Tons as fixed by Defendant	Actual Coal pro- duced and ship- ped F. O. B. Cars at mines in Gross Tons	Less Inter- State	Tonnage not shipped F. O. B. cars at mines through shortage in Car Supply G. T.	Average Market Price per Gross Ton	Cost per Gross Ton	Loss per Ton	Loss of Profits on coal not ship- ped F. O. B. Cars at Mines
1903									
April	24	21000	4472		16526	1.75	.96	.79	13057.12
May	24	16080	3106		12974	1.75	.96	.79	10249.46
June	24	16080	4619		11461	1.75	.96	.79	9054.19
July	24	16080	3852	113	12115	1.75	.96	.79	9570.85
Aug.	24	16080	7580	95	8405	1.75	.96	.79	6630.95
Sept.	24	16080	4941		11139	1.75	.96	.79	8799.81
O c t.	24	16080	5519		10561	1.75	.96	.79	8343.19
Nov.	24	16080	5772		10380	1.50	.96	.54	5506.32
Dec.	24	16080	7845		8235	1.50	.96	.54	4446.90
1904									
Jan.	24	16080	2836		13244	1.50	.96	.54	7151.76
Feb.	24	16080	5729		10351	1.50	.96	.54	5589.54
Mar.	24	16080	3558		12522	1.50	.96	.54	6761.88
April	24	16080	4769		11311	1.35	.96	.39	4411.29
May	24	16080	10577		5503	1.35	.96	.39	2146.17
June	24	16080	6366		9714	1.35	.96	.39	3788.46
July	24	16080	6673		9407	1.35	.96	.39	3668.73
Aug.	24	16080	8493		7587	1.35	.96	.39	2958.93
Sept.	9	6030	1751		4279	1.35	.96	.39	1668.81
(Mine flooded to May 1905)									
1905									
May	24	16080	4426		11654	1.35	1.08	.27	3146.58
July	24	16080	6454		9626	1.35	1.08	.27	2599.02
Aug.	24	16080	5798		10282	1.35	1.08	.27	2776.14
Sept.	24	16080	5522		10558	1.35	1.08	.27	2850.66
Oct.	24	16080	6458	34	9588	1.35	1.08	.27	2588.76
Nov.	24	16080	10702		5378	1.35	1.08	.27	1452.06
Dec.	24	15000	11312	542	3146	1.35	1.08	.27	849.42
1906									
Jan.	24	15000	10897		4103	1.35	1.08	.27	1107.81
Feb.	24	16896	10850	590	5456	1.35	1.08	.27	1473.12
March	24	16896	12295		4601	1.35	1.08	.27	1242.27
April, May and June	Strike								
July	5	3125	2466		659	1.35	1.08	.27	177.93
Aug.	24	15000	12488		2512	1.35	1.08	.27	678.24
Sept.	24	15000	10338		4662	1.35	1.08	.27	1258.74
Oct.	24	15000	12064		2936	1.35	1.08	.27	792.72
Nov.	24	16512	11136		5376	1.35	1.08	.27	1451.52
Dec.	24	16512	10762		5750	1.35	1.08	.27	1552.50
1907									
Jan.	24	16512	12133		4379	1.35	1.08	.27	1182.33
Feb.	24	17250	10501		6749	1.35	1.08	.27	1822.28
Mar.	24	17250	12109		5122	1.35	1.08	.27	1382.94
854		576743	277169	1393	208181				144258.35

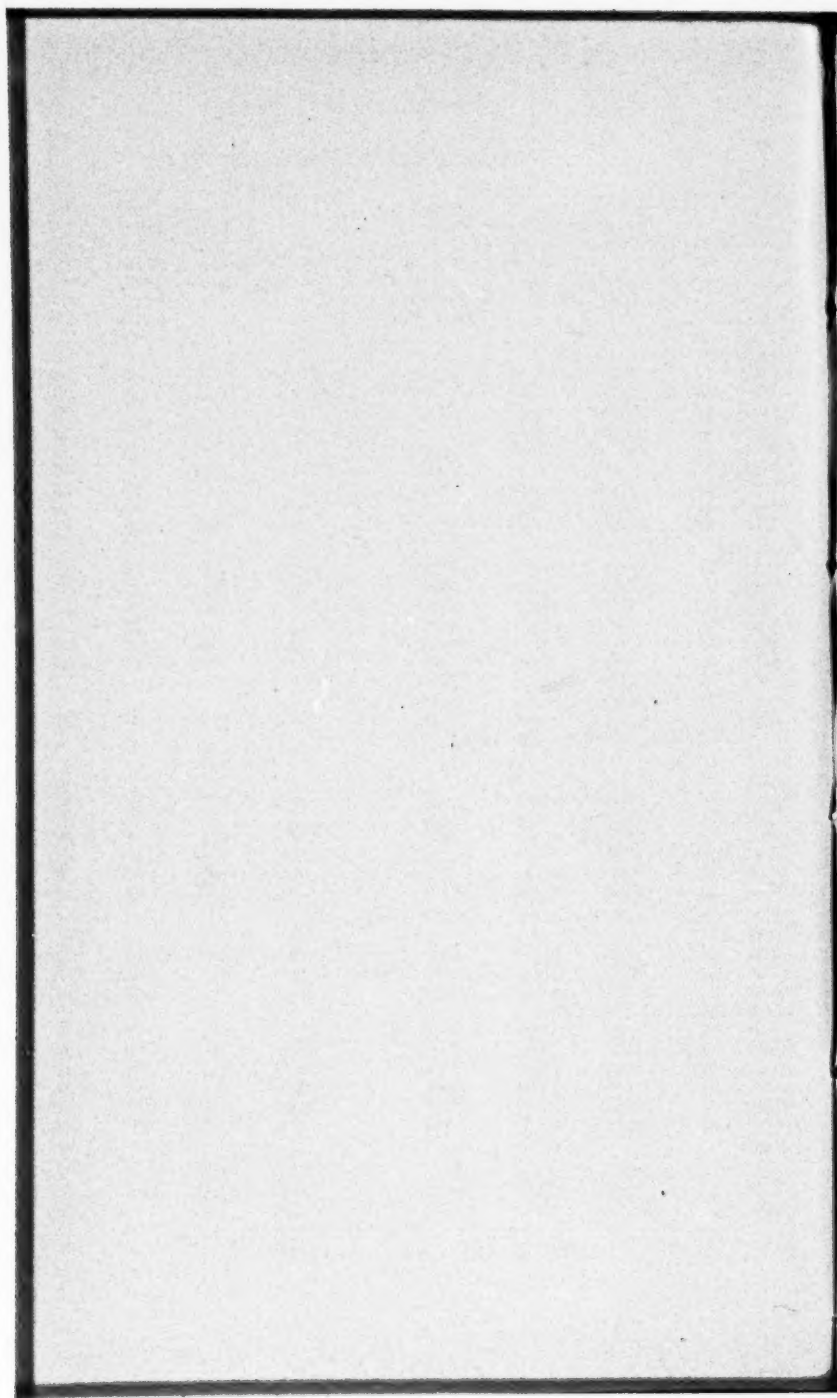
117



Plaintiff's Exhibit No. 33a

(Copy of Plaintiff's Exhibit No. 33a.)

Working Days	Rating for month in Gross Tons as fixed by Deft	Tonnage for which requisition made Gross Tons	Actual coal produced and shipped F. O. B. cars at mines in Gross Tons	Inter State	Loss in Tons State Delivery	Selling price per gross ton	Cost per Gross Ton when working to rated output	Loss per Ton	Loss of profits on State shipments that would have been made with proper car supply
1903									
Apr. 24	21000	20750	4472		16278	1.75	.96	.79	12859.62
May 24	16080	17070	3108		12972	1.75	.96	.79	10247.88
June 24	16080	16600	4619		11461	1.75	.96	.79	9954.19
July 24	16080	16350	3852	113	12115	1.75	.96	.79	9570.85
Aug. 24	16080	18190	7580	95	8405	1.75	.96	.79	6639.95
Sept. 24	16080	19075	4941		11139	1.75	.96	.79	8799.81
Oct. 24	16080	23620	5519		10561	1.75	.96	.79	8343.19
Nov. 24	16080	19250	5772		10308	1.50	.96	.54	5566.32
Dec. 24	16080	18050	7845		8235	1.50	.96	.54	4446.90
1904									
Jany 24	16080	15450	2836		12614	1.50	.96	.54	6811.56
Feb. 24	16080	17600	5729		10351	1.50	.96	.54	5598.54
Mar. 24	16080	18475	3558		12522	1.50	.96	.54	6761.88
Apr. 24	16080	16375	4769		11311	1.35	.96	.39	4411.29
May 24	16080	17775	10577		5503	1.35	.96	.39	2146.17
June 24	16080	8275	6366		1909	1.35	.96	.39	744.51
July 24	16080	4350	6673						
Aug. 24	16080	6275	8493						
Sept. 9	6030	2000	1751		240	1.35	.96	.39	97.11
(Mine flooded to May 1905)									
1905									
May 24	16080	5725	4426		1299	1.35	1.08	.27	350.73
June 24	16080	7425	6454		971	1.35	1.08	.27	262.17
July 24	16080	19000	5798		10282	1.35	1.08	.27	2776.14
Aug. 24	16080	16450	5522		10558	1.35	1.08	.27	2850.66
Sept. 24	16080	16550	6458	34	9588	1.35	1.08	.27	2588.76
Oct. 24	16080	19450	10702		5378	1.35	1.08	.27	1452.06
Nov. 24	15000	11719	11312	542					
Dec. 24	15000	11719	11312						
1906									
Jan. 24	15000	11438	10807		541	1.35	1.08	.27	146.07
Feb. 24	16896	14719	10850	590	3279	1.35	1.08	.27	885.33
Mar. 24	16896	16406	12295		4111	1.35	1.08	.27	1109.97
April, May and June	Strike								
July 5	3125	2250	2466						
Aug. 24	15000	16870	12488		2512	1.35	1.08	.27	678.24
Sept. 24	15000	15000	10338		4632	1.35	1.08	.27	1250.64
Oct. 24	15000	16870	12604		2936	1.35	1.08	.27	792.72
Nov. 24	16512	17813	11136		5376	1.35	1.08	.27	1451.52
Dec. 24	16512	17188	10762		5750	1.35	1.08	.27	1552.50
1907									
Jan. 24	16512	17875	12133		4379	1.35	1.08	.27	1182.33
Feb. 24	17250	17250	10501		6749	1.35	1.08	.27	1822.23
Mar. 24	17250	18777	12109	19	5122	1.35	1.08	.27	1382.94
552255					239396				124625.78



A. \$124,625.78.

Mr. BIKLE: It is understood there is the same objection.

The COURT: Yes, note an objection and exception to each one of these questions.

By Mr. COLE:

Q. And the damages for the coal mined and shipped would be the same under that calculation?

A. The same, \$42,939.

(Here follow Plaintiff's Exhibit No. 33 and No. 33a, marked pages 117 and 118.)

119

(Copy of Plaintiff's Exhibit No. 34.)

"Schedule of Loss on Coal Actually Produced Through Excessive
Cost of Production.

	Gross tons mined.	Cost of production per gross tons.	Cost at which it would have been pro- duced with adequate car supply.	Loss per ton.	Loss on coal pro- duced for month.
1903					
Apr.	4822	1.24	.96	.28	1350.16
May	3434	1.39	.96	.43	1476.62
June	4966	1.25	.96	.29	1440.14
July	4047	1.36	.96	.40	1618.80
Aug.	7770	1.04	.96	.08	621.60
Sept.	5132	1.19	.96	.23	1180.36
Oct.	5904	1.14	.96	.18	1062.72
Nov.	6110	1.11	.96	.15	916.50
Dec.	8300	1.07	.96	.11	913.00
1904					
Jan.	3177	1.55	.96	.59	1874.43
Feb.	6192	1.09	.96	.13	804.96
Mar.	3884	1.33	.96	.37	1437.08
Apr.	5085	1.09	.96	.13	661.05
May	10933	1.00	.96	.04	437.32
June	6509	1.34	.96	.38	2473.42
July	6939	1.09	.96	.13	902.07
Aug.	8806	1.00	.96	.04	352.24
Sept.	1992	1.49	.96	.53	1055.76
Flood to June '05.					
1905.					
June	4767	1.55	1.08	.47	2240.49
July	6488	1.17	1.08	.09	583.92
Aug.	6151	1.17	1.08	.09	553.59
Sept.	5858	1.18	1.08	.10	585.80
120 Oct.	6836	1.19	1.08	.11	751.96
Nov.	10942	1.19	1.08	.11	1203.62
Dec.	11722	1.10	1.08	.02	234.44
1906.					
Jan.	11396	1.12	1.08	.04	455.84
Feb.	11174	1.10	1.08	.02	223.48
Mar.	13174	1.14	1.08	.06	790.44
April, May and June Strike.					
July	2560	1.88	1.08	.80	2048.00
(23 to 31.)					
Aug.	12629	1.15	1.08	.07	884.03
Sept.	10650	1.19	1.08	.11	1171.50
Oct.	12371	1.12	1.08	.04	494.84
Nov.	11701	1.18	1.08	.10	1170.10
Dec.	10952	1.30	1.08	.22	2409.44

1907.

Jan.	12117	1.19	1.08	.11	1332.87
Feb.	10549	1.31	1.08	.23	2426.27
Mar.	12178	1.31	1.08	.23	2800.94
	<hr/>				
	288217				<hr/>
					42939.80"

121 IRA JONES, recalled on part of defendant.

By Mr. O'LAUGHLIN:

Q. You were sworn in this case? Have you examined the books of the plaintiff, the Sonman Company?

A. Yes sir.

Q. Have you examined their shipping book?

A. I have.

Q. Gone over the items which go to make the tonnage shipped?

A. I have.

Q. And ascertained the total tonnage shipped?

A. Yes sir.

Q. You also went over this in conjunction with other persons representing the defendant, did you?

A. I did.

Q. Did you make a statement from the books and do you or do you not know for April, 1903, the tonnage shipped by the plaintiff to points outside the State of Pennsylvania?

A. I did.

Q. How many tons for April, of 1903, did the plaintiff ship outside the State of Pennsylvania?

122 Mr. COLE: We object to that as irrelevant, incompetent and immaterial. The plaintiff's testimony shows that the coal was sold f. o. b. cars at the mines, whether or not it went outside the State is immaterial, because it was not under the control and jurisdiction nor ownership of the plaintiff and its destination was entirely directed by other parties.

By Mr. O'LAUGHLIN:

Q. Did or did not the book of the plaintiff show the destination of the coal as you took it off on your statements for April, 1903?

Mr. COLE: It does. If they will add to the question that they propose to show the coal sold and to be delivered by the plaintiff outside of the State on which he paid freight or which he agreed to deliver outside the State, we will not object to it.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

Mr. O'LAUGHLIN: I will make an offer. The plaintiff having proved that during the period of this action it delivered to the defendant 288,217 tons of bituminous coal for shipment, the defendant now offers to prove by the witness on the stand how much of this tonnage so delivered was consigned by the plaintiff to destinations outside of the State of Pennsylvania. This for the purpose of de-

termining what, if any, jurisdiction this Court has of the issues involved in this action as to the shipment of this coal so shipped.

Mr. COLE: The testimony disclosing the fact that the plaintiff sold the coal f. o. b. cars at its mine and that it had no jurisdiction or control over it after it was loaded, and that whatever its destination it was directed by the purchasers and not by it, and that it sold
 123 no coal delivered or to be delivered outside of Pennsylvania, the testimony is objected to as irrelevant, incompetent and immaterial. If they propose to confine this testimony to coal to be delivered by the plaintiff outside the State or upon which it was to pay freight to the destination outside the State, the objection will be withdrawn.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

124 G. W. CREIGHTON, called on part of defendant, being duly sworn and examined, testified as follows:

* * * * *

By Mr. O'LAUGHLIN:

Q. Mr. Creighton, in the distribution of cars to a shipper is there or is there not any designation as to what use, meaning by that to what points of shipment the lading shall go, that the shipper shall use them for?

A. Well of course he could only use a car in the route in which it may travel under the regulations. We don't like them to route cars out of their proper routes or manifest cars out of a proper route.

Q. That isn't what I mean. May they send them out of the State, if they please?

A. Well we haven't any control over that. If they went in the route the car might travel in, it might be a State or Interstate shipment. It didn't make any difference to us, we didn't know where it was going.

Q. You don't designate where it shall go?

A. No.

Q. When they are delivered to the shipper you don't designate where they shall go?

A. Except they go in some designated route. Cars in New England would be a given kind of car. Our cars might go to some destination, but we never restricted them as to State or Interstate.

* * * * *

125 M. TRUMP recalled on part of defendant.

By Mr. O'LAUGHLIN:

Q. In January, of 1903, what was your connection with the Pennsylvania Railroad?

A. General Superintendent of Transportation.

Q. Under that did you have general charge of the transportation of things offered for shipment?

A. Yes sir.

Q. And of the equipment to transport it?

A. Yes sir.

Q. Were there from your office sent out at that time, under your direction, instructions and orders to other officers of the Company about certain parts of your part of the business?

A. Yes sir.

Q. Is that a copy of one of the orders sent out by you?

A. This is the original.

Q. The original?

A. Yes sir.

Q. What is the date of it?

A. January 14th, 1903.

Q. Did it obtain and was it in force after April 1, 1903?

A. It was.

Q. And was it the order in force during 1903, subsequent to that April 1, 1903?

A. The order took effect February 1st, 1903, and continued throughout the year, yes sir. (Paper marked Defendants' Exhibit No. 3.)

Q. Can you tell how much longer it continued from that?

A. Until the next notice was issued. I have forgotten the exact date.

Q. Is or is not that the next notice?

A. Yes sir, this is dated March 28th, 1905, taking effect April 1st, 1905.

Q. That is the one following the previous one?

A. Yes sir. (Paper marked Defendant's Exhibit No. 4.)

126 Q. How long did Exhibit No. 4 continue to be the rule as to bituminous coal business?

A. I think until January 1st, 1906.

Q. Is that letter, dated January, 1906, the one next issued?

A. January 1st, 1906.

Q. When did that take effect?

A. January 1st, 1906. (Paper marked Defendant's Exhibit No. 5.)

Q. Were all these three orders issued from your office?

A. Yes sir.

Mr. COLE: Do you offer these?

Mr. O'LAUGHLIN: Yes, for the purpose of proving what the rule was which obtained on the Pennsylvania Railroad system, the Defendant's system, from the time of the first order until the end of this action, to show the method in which they proceeded for the distribution of cars which they had for bituminous coal purposes and which they gave to shippers for shipping that coal.

Mr. COLE: Standing alone they would be irrelevant and immaterial in this case. They can't issue any order over their own signature that will change their legal liability. I don't think they are very material. If they want to put them in, they can put them in. If they are not to be followed by any other, they would only encumber the record, as we look at it, because they can't issue an order that will affect their legal liability.

Mr. O'LAUGHLIN: Of course, we are going to follow it at least by an attempt of proof that the Railroad Company's officers complied with it and in the compliance with it the plaintiff was supplied with the cars ordered or its proportionate part of them.

127

(Copy of Defendant's Exhibit No. 3.)

"Pennsylvania Railroad Company.
Philadelphia, Baltimore & Washington Railroad.
Northern Central Railroad.
West Jersey & Seashore Railroad.

Office of the General Superintendent of Transportation.

PHILADELPHIA, January 14, 1903.

General Notice to Shippers of Bituminous Coal.

Taking effect February 1st, 1903, the following rules will govern the distribution of cars to coal mines located on the Pennsylvania Railroad lines East of Pittsburg and Erie:

1. All railroad cars, regardless of ownership and private cars not owned by the party loading them, will be considered as applying on the pro rata distribution to each mine.

2. Cars placed by the Pennsylvania Railroad Company for its coal supply will be considered as additional to the pro rata allotment and must be used only for such shipments. If otherwise used, they will be subject to reconsignment to this Company.

M. TRUMP,
General Superintendent of Transportation."

128

(Copy of Defendant's Exhibit No. 4.)

"Pennsylvania Railroad Company.
Philadelphia, Baltimore & Washington Railroad.
Northern Central Railroad.
West Jersey & Seashore Railroad.

Office of the General Superintendent of Transportation.

PHILADELPHIA, March 28th, 1905.

General Notice to Shippers of Bituminous Coal.

Taking effect April 1st, 1905, the following rules will govern the distribution of cars to coal mines located on the Pennsylvania Railroad lines East of Pittsburg and Erie:

1. All railroad cars regardless of ownership, except as specified in the next paragraph hereof, and also all private cars not owned by the party loading them, will be considered as cars for distribution to mines in the several districts.

2. Cars placed by the Pennsylvania Railroad Company for its coal supply, and empty cars of other railroad companies for their coal supply, delivered to the Pennsylvania Railroad Company and specially consigned under special arrangements between the companies, will not be subject to distribution and allotment, but must be exclusively for the special purposes designated.

M. TRUMP,

General Superintendent of Transportation.

Approved,

W. W. ATTERBURY,

General Manager."

129

(Copy of Defendant's Exhibit No. 5.)

"Pennsylvania Railroad Company.
Philadelphia, Baltimore & Washington Railroad.
Northern Central Railroad.
West Jersey & Seashore Railroad.

Office of the General Superintendent of Transportation.

PHILADELPHIA, January 1st, 1906.

General Notice to Shippers of Bituminous Coal.

In accordance with a circular letter issued to shippers of bituminous coal in June last, the ratings of bituminous coal mines located in the following regions have been carefully revised and the new ratings have been put in effect:

Tyrone,

Pennsylvania & Northwestern,

Cambria & Clearfield,

Pittsburg Division, East End and

South Fork & Scalp Level.

Revised ratings for bituminous coal mines in the following regions will be put in effect on an early date:

Pittsburg Division, West End.

West Penn, and

River and Low Grade Divisions (A. V. Ry.).

Commencing January 1st, 1906, assigned cars, i. e. cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of 130 a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated.

M. TRUMP,

General Superintendent of Transportation.

Approved,

W. W. ATTERBURY,

General Manager."

By Mr. O'LAUGHLIN:

Q. Mr. Trump, how many divisions or coal districts were there when the first order was issued?

A. The same number. Nine I think it was.

Q. How many?

A. Nine, I think, regions all told.

Q. Did that continue up — during the time of this action?

A. Yes sir, there was no change in the number.

Q. In a general way the bituminous coal empty cars come from what direction?

A. Come from the East principally.

Q. And are distributed from what part of the system?

A. The first distribution is made at Harrisburg.

Q. And they are sent from there out into the bituminous region then?

A. Yes sir.

Q. Are they there sent into the different districts?

A. Yes sir.

Q. In the method of the distribution of coal cars do these rules promulgated in these notices fundamentally govern the distribution?

A. They are the basis of the distribution.

Q. Did you or did you not, yourself and men associated with you, make some rating of the mines during the time this action was brought for?

A. I did.

131 Q. In what year was that?

A. 1906 they took effect. We were about a year making them.

Q. How far in detail did the work go, was it to determine the rating of a mile or a district?

A. A mine.

Q. There was some character of examination of the mine made itself was there?

A. The mines were inspected by a corps of inspectors and the maximum, what we call the maximum, physical capacity determined by the working places and their haulage system and the things a mining engineer usually takes into consideration. That was combined with the average daily tonnage shipped for the 12 months preceding and that was the basis of our rating, an average between the two.

Q. Before that who made the ratings?

A. Prior to that time the ratings were fixed by the Division Superintendents.

Q. Mr. Trump, after fixing those ratings, can you from your knowledge of it and dealing with it in a general way give us what your belief is as to the rating as compared with the output?

A. I can.

Q. What was that?

A. Those ratings were revised every three months and it was necessary in the revision of those ratings to get the tonnage shipped from each mine as a basis of the quarterly revision, and from 1906

up to the present time the shipments have averaged from 50 to 51 per cent of our rated capacities.

Q. Taking the whole bituminous field?

A. Taking the region as a whole.

Q. Taking it all into consideration they averaged along 50 to 51 per cent?

A. Yes sir.

132 Q. Since you have had familiarity with it?

A. Yes sir.

Q. In the orders, which are Exhibits 3, 4 and 5, and in dealing with the bituminous coal business or traffic for the purposes of your office and as to the parts you have testified to, was there any distinction or anything taken into consideration with regard to whether the coal was to be shipped inside the State or outside the State?

A. No sir.

Q. The rules apply to both, do they?

A. We don't know when we put a car into a mine where it is going to at all.

Q. The one system of distribution applied to both, is that the way?

A. Yes sir.

Q. In the business of your office down there I believe you said you were familiar with both inside and outside the State business. Both were in your office as General Superintendent of Transportation?

A. Yes sir.

Q. Did the Railroad Company or does the Pennsylvania Railroad Company run outside the State of Pennsylvania?

A. It does.

Q. Does it haul traffic generally from this to other States?

A. Yes sir.

Q. Does it haul bituminous coal traffic from its line to other railroads of the State?

Mr. LIVERIGHT: Objected to as immaterial and irrelevant to this issue.

By Mr. O'LAUGHLIN:

133 Q. Does the Pennsylvania Railroad Company in its business on joint rates with other railroad companies and having the joint rates I will ask first if it does have joint rates with other railroad companies?

A. It does.

Q. To points outside the State of Pennsylvania?

Mr. LIVERIGHT: Objected to as immaterial and irrelevant.

Mr. O'LAUGHLIN: The defendant offers to prove by the witness on the stand that during all of the period of this action the defendant had in effect on and for shipments of bituminous coal through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even

when on the lines of other railroad companies; that as a result of doing this is had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive.

Mr. LIVERIGHT: Objected to, first, as immaterial and irrelevant, second, as being no answer to the complaint made in this case or the testimony adduced in this case; and third, as being entirely inconsistent with their own testimony that they have already put in.

The COURT: Objection sustained, evidence excluded, exception noted and bill sealed for defendant.

134 By Mr. O'LAUGHLIN:

Q. Mr. Trump, did you have prepared in your office, under your direction and for you, some figures with regard to the general bituminous coal tonnage?

A. Yes sir.

Q. Can you or can you not let us know what in general was the increase in the proportion of tonnage, taking one of your regular periods, June 30th, 1903, to June 30th 1907?

A. Yes.

Mr. LIVERIGHT: Over what region or district does that extend?

By Mr. O'LAUGHLIN:

Q. Over the bituminous coal region on the Pennsylvania lines?

A. This is tonnage originating on the Pennsylvania Railroad only, for which we furnish cars, and the increase was 8,060,915 tons or 28 5/10 per cent during that period.

By Mr. LIVERIGHT:

Q. That is between June 30th, 1903 and June 30th, 1907, the increase was 28 5/10 per cent?

A. 28 5/10 per cent.

By Mr. O'LAUGHLIN:

Q. Now what was the percentage or tonnage increase in the equipment for the hauling of that class of trade during the same period?

A. 70 2/10 per cent. The tonnage capacity of the coal car equipment increased during the same period 70 2/10 per cent.

Q. The other was 28 5/10 per cent?

A. 28 5/10.

135 Q. Taking into consideration the time for which this action is brought, April 1st, 1903, to April 1st, 1907, can you give us any general figure percentage of the usual annual increase in bituminous coal tonnage on the Pennsylvania Railroad Company's lines?

A. I think so.

Q. One answer will do for it all. I don't want figures other than to say what the gradual increase is if it is an increase, or decrease if it is a decrease?

A. There was an increase the first year, then a decrease, then a large increase, then a continued large increase covering the four years, which I can give you the exact figures if you want them.

Cross-examination.

By Mr. LIVERIGHT:

Q. Under your 1903 rule, Mr. Trump, individual cars and Pennsylvania Railroad supply cars were not counted against the distribution of the coal operator, were they?

A. No sir.

Q. And that rule remained in force until your regulation of March 28th, 1905?

A. Yes sir.

Q. On March 28th, 1905, you further widened the scope and decreed that foreign railroad supply coal also should not count against the distributive share of the operator, didn't you?

A. Yes sir.

Q. So that in 1903 there were two classes of cars that didn't count against distribution, individual cars and Pennsylvania fuel supply?

A. Yes sir.

Q. And in 1905 there were three classes, individual, Pennsylvania fuel supply and foreign railroad supply?

A. Yes sir.

136 Q. In 1906 this was all changed, wasn't it?

A. Yes sir, the basis was entirely changed.

Q. And from that time on until 1910 all cars counted against distribution?

A. Yes sir, subject to revision.

Q. That is to say, in 1903, if a man had a rating of 20 cars a day and got 10 private cars and 5 Pennsylvania Railroad Company fuel order cars, those 15 cars didn't count against his rating at all?

A. No sir, not according to that method.

The COURT: That is, he still had the right to demand 20?

By Mr. LIVERIGHT:

Q. He still had his rating of 20 against the Company's system cars?

A. Yes sir.

Q. And that method continued down till December, 1905, or January 1st, 1906?

A. Yes sir.

Q. That gave a manifest advantage in distribution to the man who had individual cars and Company orders, didn't it?

A. Well he owned those cars, they were not ours for distribution.

Q. Answer the question. It gave a manifest advantage to him in the number of cars he would get?

A. Yes sir, I would say it did give him some advantage.

Q. And in 1906, when you changed these rules January 1st, 1906 that advantage was in a measure done away with, wasn't it?

A. Slightly, wasn't it.

Q. Considerably, wasn't it?

A. Yes sir.

137 Q. Unless you owned cars sufficient to take care of your entire output?

A. Yes, it was practically the same method as the Interstate Commerce Commission method.

Q. But it didn't change anything specially, except that the man who had the private cars and Company order didn't have such a marked advantage as he had before?

A. Yes sir.

Q. In 1903 and 1904 what was the percentage of distribution, that is, how did the cars furnished compare with the ratings of the mines?

A. I can't give you that from recollection.

Q. Don't you know it was about a third?

A. No, I think it was higher than that.

Q. Haven't you testified in many of these cases it was about a third?

A. No sir.

Q. Or not much over a third?

A. No, I testified to shipments in the previous cases were one-third of the maximum physical capacity determined by the inspectors. That is what I testified to.

Q. Can you get figures showing what the distributive pro rata was for 1903 and 1904 on your railroad while these old regulations were in effect?

A. No. They are on the sheets there.

Q. Don't you know they were considerably less than beginning January 1st, 1906, when the new rule went into effect?

A. I know they were less because we counted the car in 1906 every day it stood over empty.

Q. You do know they were less then?

A. To that extent and I know we had more equipment at that time.

Q. Don't you know that in February, 1906, in 27 days worked, the Mountain Division percentage compared to ratings was 1727.69?

138 A. No sir, I don't.

Q. You don't know anything about that?

A. No sir, if it is so, it was on the sheets.

Q. Don't you know in March, 1906, under the new rule the percentage was 2383.26 for the month?

A. I do not.

Mr. BIKLE: Objected to as not cross-examination. The witness has not been asked for the specific ratings.

By Mr. LIVERIGHT:

Q. After you adopted the new method of rating the mine a great many of them materially fell, didn't they?

The COURT: A great many what?

By Mr. LIVERIGHT:

Q. A great many of the ratings fell?

A. No, they didn't fall very much. I don't think the reduction was over 300 cars on the whole railroad, and I will say further that they fully confirmed the ratings made by the Division Superintendents; that there wasn't a mine on the system whose percentage was changed more than one or two tenths of one per cent.

Q. That applied to the Sonman Shaft mine?

A. That applied to Sonman Shaft, as well as the others.

Q. And after the new method went into effect the Sonman Shaft, which was rated 750 tons, was rated 735, wasn't it?

A. I can't recall. Whatever it was on the sheet.

Q. 21 cars. Isn't that correct?

A. I haven't those in my head. Whatever was on the sheet is what it was. If you have the sheet there, I will pick it out for you.

139 G. E. OLER called on part of defendant, being duly sworn and examined, testified as follows:

By Mr. BIKLE:

Q. What is your position with the defendant Company?

A. Car clerk in the General Superintendent's office, Altoona.

Q. How long have you held that position?

A. About 12 years.

Q. What are your duties as car clerk?

A. Well we trace cars and take a record of the distribution of cars, compute percentages of distribution.

Q. Have you had experience with the ascertainment of percentage particular mines are entitled to under the distribution prevailing in this Company?

A. Yes sir.

Q. Have you examined the distribution sheets of the Pennsylvania Railroad Company for the Mountain Region from April, 1903 to April 1st, 1907, with a view of ascertaining the allottable cars in the region and the number delivered to the plaintiff?

A. Yes sir, I have.

Q. Counsel shows witness statement marked Defendant's Exhibit No. 6. Is that the computation and compilation which you made from the sheets, showing for the period in question the allottable cars placed in the region, the allottable cars placed on the days Sonman ordered cars, Sonman's per cent., Sonman's allottable share of cars, how many cars it received, how many it was over and how many it was short, by months?

A. Yes sir.

We offer that in evidence as a compilation of the facts appearing on the sheets.

140 Mr. LIVERIGHT: Objected to until we have had an opportunity to cross-examine the witness.

Q. What do you mean by allottable cars?

A. Allottable cars are cars that are subject to allotment, or, in other words, free cars that the Company could have distributed any place they wanted.

Q. System cars?

A. System cars generally speaking.

Q. Does it include private or individual cars?

A. It does not.

Q. Does it include Company coal cars?

A. It does not.

Q. Does it include foreign railroad fuel supply cars?

A. It does not.

Q. What other classes of cars does it not include?

A. Does it not include?

Q. Yes?

A. With the exceptions you have made, it includes all other kinds.

Q. Those are the only excepted classes?

A. Yes sir.

Q. Those three?

A. Those three.

By Mr. BIKLE:

Q. In making this computation and compilation have you done it in conformity with the rules of distribution and practice under those rules which, during the particular periods of this action, were in effect on the lines of this Company?

A. I have in accordance with the distribution at that time during that period.

Mr. LIVERIGHT: The offer is objected to for the reason that
141 the computation is founded on a set of rules which have been held to be discriminatory by the Interstate Commerce Commission, whose rulings on the subject have been sustained by the United States Supreme Court. That in any view of the testimony as it now stands in the case it is irrelevant, incompetent and immaterial and is not rebuttal and does not prove any substantive defensive matter.

The COURT: The Court will admit this paper for the present and we will control its effect hereafter. Exception noted for plaintiff and bill sealed.

(Copy of Defendant's Exhibit No. 6.)

"Statement showing allottable cars placed in Mountain Region; Allottable cars placed on days Sonman Shaft Coal Co. ordered cars. Also percentage of cars allottable to plaintiff; also plaintiff's allottable share of cars. Wooden basis—one steel equal to two wooden cars up to December 1st, 1905 and afterwards equal to a car and a half:

SONMAN SHAFT COAL COMPANY.

85

Month and Year.	Allottable cars placed in region.	Allottable cars placed on days Sonman ordered cars.	Sonman's per cent.	Sonman's allottable share of cars.	Received.	Over.	Short.
1903—							
April....	4572	4463	4.5	201	174		27
May.....	4632	4632	3.8	176	110		66
June.....	5217	5217	3.8	198	185		13
July.....	5028	5028	3.8	191	144		47
Aug.....	5065	5065	3.8	192	298	106	
Sept.....	4708	4708	3.8	179	224	45	
Oct.....	4105	4105	3.7	152	181	29	
Nov.....	4107	4107	3.6	148	205	57	
Dec.....	4826	4644	3.7	172	283	111	
1904—							
Jan'y....	3557	3146	3.6	113	89		24
Feb'y....	4477	4477	3.5	157	134		23
March...	5113	4700	3.6	169	78		91
April....	4176	3775	3.6	136	116		20
1905—							
May.....	4181	4181	3.5	146	219	73	
June.....	3472	1877	3.5	66	134	68	
July.....	3450	1053	3.5	37	127	90	
Aug.....	3626	1247	3.5	44	173	129	
Sept.....	3493	2868	3.5	100	63		37
1906—							
Jan'y							
1 to 13...	1128	Surplus of cars on hand, no percentage used...		26½	26½		
14 to 31..	1652	Daily percentage used.....		55½	31½		24
Feb'y....	3692	"		102	102½	½	
March....	3749½	"		88	64½		23½
Aug.....	5231½	"		141	142½	1½	
Sept....	4804	"		161½	152		9½
Oct.....	4705½	"		103½	120½	17	
Nov.....	3498½	"		31	42½	11½	
Dec.....	4607½	"		86	84		2
1907—							
Jan'y....	6180	"		90½	80½		10
Feb'y....	3332½	"		56	88½	12½	
March...	4592½	"		91	95½	4½	
Feb'y 23rd, 1912.							

Feb'y 23rd, 1912.

143 Cross-examination.

By Mr. LIVERIGHT:

Q. Do you know how many private cars there were in the region between April, 1903 and December, 1905?

A. I can tell you, but I don't have my data with me.

Q. Where can you get that?

A. It is over at the hotel.

Q. How long will it take you?

A. About three minutes.

Q. Can you as quickly get the list of Company supply coal that is there?

A. Yes sir.

Q. And all these cars excluded from your table?

A. Yes sir, I have got it in memorandum form.

Q. In addition to these cars that you call allottable cars placed in the region, how many were there that went into the region in 1903, including individual and fuel supply cars?

A. 1903?

Q. Yes?

A. For the nine months of 1903 there was 7180 assigned cars, that is, counting car for car.

Q. That includes the three classes that you have specified?

A. Yes, that includes Company coal, individual and foreign supply when there was any.

Q. How many of those were steel cars?

A. There was 334.

Q. In 1904 how many were there that you haven't counted in this table?

A. I was mistaken in those figures. I got the total of a quarter. I will give you the year now.

Q. I thought that was a little low?

A. That was for a three months' period. A total of assigned cars for 1903, for nine months of 1903 was 20,068.

144 Q. How many of them were steel?

A. Out of that 334 were steel.

Q. Are you sure that is for the whole year?

A. Yes sir.

By Mr. BIKLE:

Q. Any total you give you count steel as two?

A. In these totals, unless I designate them, are car for car. There was 334 steel for Company coal.

By Mr. LIVERIGHT:

Q. The individual cars are not classified as to steel or other?

A. At that time there was no distinction made. There may have been individual steels, but they are recorded on the sheets as individual cars.

Q. Do you know as a fact whether there were a great many individual steels in this State?

A. No, from my experience I say there wasn't.

Q. At that time?

A. Very few at that time.

Q. In 1904 how many assigned cars were there you haven't counted in this table?

A. 25,212.

Q. How many of them were steel?

A. 172 steel for Company coal.

Q. You don't know how many of the individual cars were steel?

A. No sir, the sheets don't record them.

Q. Was the number of steel individual cars greater that year?

A. I would say it was about the same.

Q. How many assigned cars were there in 1905, from May to December, that are not counted in this table?

A. From May to December, 1905?

145 Q. Just count it there?

A. From May to December, 1905, there was 23,216.

Q. Almost as many cars as you have included in the table for that period?

A. Yes sir.

Q. How many of them were steel cars?

A. There were 2,015 of them steel.

Q. Can you yet tell how many individual steels there were?

A. In December is the month we started in with the individual steel, there were 1,688. Those are for the nine months of 1905.

By Mr. BIKLE:

Q. There were only eight months. He asked you for from May to December?

A. Of the eight months. I called it nine months by mistake.

Q. What you say about the steel is also eight months?

A. That is also eight months.

By Mr. LIVERIGHT:

Q. And the individual steel applied only to December 1905?

A. Yes sir, that is when they were separated.

Q. Is that in addition to the other steels you mentioned, 2,016?

A. Yes sir.

Q. How many assigned cars were there in the year 1906 not included in this table?

A. The year 1906 was a year where they counted cars standing over as cars placed, so for that reason I cannot give you the actual number of cars placed, but I can give you the total number of individual or assigned cars available during that period.

146 Q. Are they included in this table?

A. No sir, they are not.

Q. How many are there?

A. I can give you for January. In January there were 4518. Those are actual cars placed.

Q. February?

A. February there was 115,505. That is counting cars standing over twice in accordance with the distribution sheet at that time.

Q. Would it be one-half that, do you mean, actual cars?

A. They are actual cars, but they are cars that at that period the sheet has shown cars available for distribution. The cars that were on the siding today that was not loaded was counted on tomorrow's total, and for that reason we can't show them separately.

Q. There was one hundred and fifteen thousand odd of those?

A. Yes sir, equal to that many cars, counting of course some cars maybe several times.

Q. You can't tell exactly how many cars placed?

A. I can't tell exactly the actual cars placed.

Q. How many in March?

A. In March?

Q. Yes?

A. I gave you that. 115,101 was for the year.

Q. I asked you for February?

By the COURT:

Q. Why did you give January separate?

A. They didn't start that method until February.

Q. From February on until the balance of the year?

A. Cars standing over is counted cars placed and for that reason are compromised in one total.

147 By Mr. LIVERIGHT:

Q. They are of course not included in this table?

A. No sir, they are not.

Q. Does that include steel cars?

A. That includes everything. I can give you the number of steel cars computed on that same basis.

Q. How many of those 115,000 odd were steel cars?

A. Of that number there were 12,921 steel cars.

Q. In 1907, the months of January, February and March, how many assigned cars do not show on this table?

A. In January there were equal to 8596 assigned cars, that is, counting cars standing over as cars placed. Then for February and March there were 7841.

Q. In those three months how many of the cars you have referred to were steel cars?

A. There were 4758 of them steel cars.

Defendant rests.

Rebuttal.

Mr. LIVERIGHT: Plaintiff offers table showing the number of cars ordered and number of cars delivered between April, 1903, and November, 1905, counting steel cars two. (Paper marked Plaintiff's Exhibit No. 43.)

Mr. BIKLE: We have no objection.

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C. P., Clearfield County, May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

VI. Charge of the Court.

SMITH, P. J.:

Gentlemen of the Jury, you have been sworn in a case in which the Sonman Shaft Coal Company, a corporation, is the plaintiff, and the Pennsylvania Railroad Company, a corporation and a common carrier, is the defendant. The action is in trespass, in which the plaintiff seeks to recover damages suffered by it as a coal operating company because of alleged illegal and wrongful acts of the defendant. The plaintiff Company is a coal operating company, doing business on or near the main line of the Pennsylvania Railroad, in Cambria County, near Portage, and was the lessee of a property consisting of 962 acres of land, having thereunder what is known as the "B" or Miller vein of coal, of which vein they were the lessees for said acreage, 962 acres.

The plaintiff's claim in this case begins from April 1st, 1903 and extends in two periods after that date, the first period running from April 1st, 1903 until sometime in September, 1904, and then a later period beginning in June, 1905, after the flood, and extending until March, 1907. The plaintiff Company became the lessees of that property in 1899, and their leases consisted not only of the acreage before mentioned but of the equipment, improvements, siding and other mining facilities located on the property. It is alleged on behalf of the plaintiff that its mine equipment consisted of a
149 shaft 325 feet deep, tippie, cages, electric haulage equipment, mules, siding, mine cars and everything necessary to run the mine at the beginning of this action, namely, April 1st, 1903, and that it had at that time not only the equipment but the development inside of the mine necessary to afford facilities for an output of 1000 tons a day and upwards. That their coal was known as the Sonman coal, of a high grade, three and one-half feet and more in thickness, and that the coal which was the output of that mine commanded a ready sale in the market, at a price greater than the coals of inferior grade from other districts. The defendant, the Pennsylvania Railroad Company, is the owner of, and controls and operates the main line of the Pennsylvania Railroad and its branches therefrom, and it is admitted that the said Railroad is a common carrier of both freight and passengers and as such owes a general and special duty to the public, and consequently a duty to the plaintiff corporation, which duty said defendant is alleged to have violated, wherefore this action was brought.

The claim of the plaintiff in this case, both in its pleadings and in its proof, consisted of two separate and distinct branches of alleged

violation of duty, the first of which is that the plaintiff claims that the defendant neglected and refused to furnish an adequate and sufficient supply of cars to the plaintiff during the period of the action; and second, it is alleged, and proof was offered to show, that the defendant as a common carrier violated its duty in that it discriminated against the plaintiff in favor of other shippers of coal, under like circumstances and conditions, in the matter of car distribution. Both of these claims of damages are based on the duty of the defendant corporation, as a common carrier, under the requirements of the common law, as also under the requirements of the Pennsylvania Constitution and our statutory law. The charter grant of the State of Pennsylvania to the defendant Company gave it certain privileges, such as the right of eminent domain, but this great privilege carried with it the requirement that it should serve the public, both as a public highway and as a common carrier, with all the incidents of liability as well as all the incidents of privilege attached thereto. Among the duties of a common carrier, in ordinary times, therefore, it is required to furnish an adequate and sufficient supply of cars to transport whatever freight is tendered to it for transportation, and in addition thereto it is bound as a common carrier to extend to all persons, under similar circumstances and conditions and during the same period of time, the equal enjoyment of all facilities, for transportation. Among such facilities, in connection with the bituminous coal trade of Pennsylvania, it is well recognized that distribution of cars is one of prime importance. As I said before, these duties were common law duties, but in addition thereto the public have been safe-guarded in the language of the Constitution of Pennsylvania, enacted in 1873, some of the provisions of which Constitution are pertinent to this case. For instance, Article 17, Section 1, says, "All railroads and canals shall be public highways and all railroad and canal companies shall be common carriers." Section 3 says, All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for or in facilities for transportation of freight or passengers within the state or coming from or going to any other state." Section 7, of the same Article, uses the following language: "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise, and no railroad or canal company, or any lessee, manager or employee thereof, shall make any preferences in furnishing cars or motive power."

In addition to said constitutional provisions the Legislature of Pennsylvania, by an Act passed 4th June, 1883, enacted provisions intended to aid in carrying out the prohibitions of the Constitution and to especially enforce the provisions of the 17th Article, above referred to. This Act of Assembly especially penalizes violations of the Constitutional and common law prohibitions above mentioned, first, in allowing the recovery of treble damages for such violations, and second, in providing for punishment

of the officers especially concerned in such violations. With this Act of Assembly, or rather with its penal provisions we have nothing to do in this case, for the reason that no claim is made for treble damages. I will not, therefore, read the Act of Assembly nor make any further comment thereon. Only single damages can be recovered in this case in any event, because the plaintiff, by its pleadings, has limited the claim to such damages. We have, therefore, in this case, only to consider virtually but one branch of the claim, because the plaintiff's Counsel have also eliminated the question of damages incident to what is called discrimination or favoritism, if any, practiced by the defendant. Some proof was offered by the plaintiff to show that some discrimination was practiced by the defendant company's officers against the plaintiff, but they have failed to offer the elements of proof necessary for the jury to assess the compensation which you should allow it on this branch of the case. What the plaintiff, therefore, is entitled to recover at your hands, if you find it is entitled to recover at all in this suit, is the amount which will compensate it for the alleged failure of the defendant Company to do its duty as a common carrier to the plaintiff in failing to furnish an adequate supply of cars.

On this branch of the case certain further principles of law are applicable. As we understand the law, it is the duty of a railroad company, after obtaining its charter from the State, to obtain for itself the necessary equipment of motive power and carriage to reasonably fulfill the objects of its charter. In ordinary times
 152 it must have a fairly sufficient car supply, as well as the motive power equipment, to be able to furnish to its patrons and customers the facilities of transportation of freight and passengers offered, and that unless it does comply with this requirement, or unless a proper and sufficient excuse is offered for such non-compliance, it has failed to do its duty and is liable in damages. Bituminous coal cannot be stored for any length of time but must be promptly shipped. Car supply to the tipple of bituminous mines is, therefore, an absolute necessity for the carrying on of the coal business. Such car supply to any particular mine must be furnished with reasonable regularity and constancy, and also in reasonable quantity, according to the capacity of the mine or its mining facilities. In ordinary times and when there is no period of stress in the coal business, as we look at it, a common carrier is bound to furnish to an intending shipper of bituminous coal whatever cars may be shown to be reasonably necessary for the operation of said mine to fill its intended trade requirements. In times of special demand for bituminous coal there of course are periods when no railroad company could be expected to furnish all the cars demanded for the trade. In such times the railroad company may, and as a matter of practice do, ascertain the capacity of mining properties in the several regions, and can apportion and do have a perfect right to apportion their shipping facilities or cars in accordance with a fair and equal pro rata division thereof. Of course, if in such times of stress it fails to fairly apportion, and unfairly or unduly and unreasonably favors one shipper over another, it amounts to discrimi-

nation for which the common carrier is liable. It is equally liable, however, if it fails to do its duty when there is no exceptional demand for cars and refuse, for whatever reason, to furnish cars on requisition for legitimate trade purposes and trade demands.

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Now, as we said before, in this case discrimination, that is unfair treatment between this corporation plaintiff and other operators, is alleged and some proof offered on that subject, but they have not presented any data from which the jury could estimate the damages resulting from discrimination proper. Failure to furnish a sufficient and adequate supply of cars is in some respects discrimination, although the data for showing favoritism to any particular operator may not be offered. This, as we understand it, is the basis of the plaintiff's claim here. It is alleged that the plaintiff Company had a mine of a certain capacity for the production of coal; that it had the trade or demands for that coal at a good price; that is sent in its requisitions for cars to its full capacity, or at least to its rating or nearly to that, and that it failed wholly to secure from the defendant Company even sufficient cars to measure up to its rating by the Railroad Company itself. On this showing alone it claims at your hands a large sum of damages, which sum has two elements in it and which we will treat of later in our charge.

Now, then, Gentlemen of the Jury, what are the facts on which the plaintiff bases its right of recovery for an insufficient and inadequate supply of cars? They first claim to have shown that they had a mine with a shaft 325 feet deep, well equipped with all the necessary facilities for the mining of at least 1,000 tons of coal daily at the beginning of the period of the action, April 1st, 1903; that of their 962 acres of land, which acreage was entirely underlaid with the Miller vein of coal, less than 50 acres, I think the engineer said, had been mined out at the commencement of this action. This fact was to show you, Gentlemen of the Jury, that they had a property of sufficient area and equipment to have mined the large tonnage which they show they could have mined and that operations thereon could have been conducted during the entire period of this action. Next, it has been shown, on behalf of the plaintiff,

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that the Railroad Company, or its officials, rated this mine at the beginning of the action at 35 cars per day, said cars being at that time considered 25 tons each, and in May of that same year the Railroad Company established a ton basis of rating rather than a car basis of rating, and that the rating of this mine from May, 1903, was 750 tons per day. I am not clear as to whether it was 750 for all the time or 700 for part of the time. There was some change made, it wasn't uniform at 750 I believe. Plaintiff, by testimony, claimed to have shown further that this was a superior grade of coal and commanded in the market a price from 15 to 25 cents higher than other coals of the bituminous region, and also that this particular grade of coal commanding such higher prices was limited to a comparatively few operators on the Miller seam in that particular region. That at the beginning of this period, April, 1903, and continuing throughout the entire period, the plaintiff Company had inquiries and opportunities, and even contracts during a part

of the time, for selling the output of its mine, or a large part of it, on a much greater tonnage than that which it was allowed by the Railroad Company to ship. That about the beginning of the period they actually took contracts commensurate with their rating or with the capacity of the mine, and that due and owing to the failure to receive an adequate and sufficient car supply the plaintiff Company failed in many of its contracts and was obliged to cancel some of them or they were cancelled by its customers. That the plaintiff had a market for the coal which it alleges it could have shipped f. o. b. cars at the mines or within the State of Pennsylvania, and that it could have sold coal up to its rating at a reasonably fair profit had it been furnished with the shipping facilities required. It is also alleged on behalf of the plaintiff, by testimony, that they made requisitions upon the defendant daily for cars nearly equal to the

rating of the mine by the Railroad Company and that the
 155 defendant Company for a considerable portion of the time failed to furnish or deliver cars according to its demands and needs, and tables have been presented and called to your attention and commented on by Counsel, going to show the proportion of such cars furnished to those ordered. If I had time, Gentlemen of the Jury, I would use more of these tables as I go along, but I think you understand that is the table in which they show the cars ordered in one column and the cars received in another column, drawing a comparison and showing, as I think Counsel argued, about 15 or 20 or 25 per cent, probably, running through the period. It is further contended on behalf of the plaintiff that during the whole period claimed for that there were no extraordinary or unusual conditions in the coal business, and that as a consequence of these normal conditions plaintiff was entitled to receive facilities commensurate or equal to its demands or requisitions for cars.

Now then, Gentlemen of the Jury, it is entirely for you to say whether these facts are true and are sustained by the weight of the evidence offered in this case. The burden of proof is upon the plaintiff to establish the facts on which it bases its recovery by the weight of the evidence.

The defendant, as a defense in this action, relies on several legal propositions, which have to be dealt with by the Court

and which are not for the consideration of the jury. [It is first contended on behalf of the defendant that the said Court does not have jurisdiction, for the reason that the United States

Congress has conferred entire jurisdiction upon the Federal Courts or other tribunals established by Congress, and that hence there is no right of recovery for any failure of duty in furnishing car facilities in the State Courts, of which this is one. This contention, as you have noticed, we have overruled.]

Assignment of Error No. 2. [It is again further contended that only such portion of the coal which may have been or was intended ultimately to be delivered within

156 the State of Pennsylvania could be recovered in this action. With this contention we also disagree with the learned Coun-

sel and hold that where coal is sold f. o. b. cars at the mines it is a Pennsylvania delivery and that the right of action is in the State

Courts for failure of a common carrier to perform its common law or statutory duty.] [It is Assignment of Error No. 5. further contended on the part of the defendant

that the rule of law to which we have heretofore referred, which requires a common carrier in ordinary times and under ordinary conditions to have and furnish an adequate and sufficient supply of cars, does not mean that the common carrier is bound to furnish just the number of cars demanded or for which requisition is made by an individual shipper, as was this plaintiff. It is contended in its behalf that the defendant, as a common carrier, had a sufficient and adequate supply of cars for ordinary times in the coal trade as a whole but that because taking the whole number of shippers in the region the demand far exceeded the supply and, as they infer, would exceed the necessities of the trade, they were obliged to and in fact did apportion or allot their coal cars according to a pro rata schedule based on the ratings of the several mines. With this contention we do not agree. The result of that contention, worked out to its logical conclusion, would lead to the undue and unreasonable discrimination expressly forbidden.]

Assignment of Error No. 6. [As we look at the matter, a person, a firm or a corporation has a right under the law to buy or lease a coal property along the line of a railroad, to open up that property for shipping coal, to provide an equipment according to the acreage and output intended to be shipped, and has then a right to demand from the common carrier the necessary facilities to carry on the business according to the requirements of that mine. He has a right to take his chances in the market along with everybody else and it is not the business of the common carrier to try to regulate and control the output of coal so 157 that the market for coal can be controlled in either quantity or price. For this reason we, therefore, refused to allow the defendant to prove that the very customers which plaintiff alleges he lost by reason of the irregular and insufficient car supply were in fact supplied by someone else on the Pennsylvania lines.]

As a further defense to the right of the plaintiff to recover, the defendant has offered a table showing the allottable cars placed in the division of which the Sonman Shaft was a part, together with the percentage and allottable share of cars to which the plaintiff was entitled, going to show that for many of the months sued for the plaintiff Company did in fact receive its pro rata of such allottable cars, or even more than its pro rata share in some instances, although it is admitted and shown in said table that for many of the months mentioned the plaintiff Company did not receive even on that basis its pro rata share. The trouble with this table and showing is, that it is based on only the system cars of the defendant corporation, that is, cars free and available to requisition by coal shippers and excluded therefrom in that calculation all other cars, such as Pennsylvania Railroad fuel supply cars, individual or private cars, and

foreign or other railroad cars assigned to shippers. You will understand, gentlemen, that the Pennsylvania Railroad has under its control at times, first, its own coal cars for the general trade; second, it has a certain portion of its own cars which are designated by the Company to be used in their fuel supply trade; third, as a car classification, there are what is known as private or individual cars, that is, cars owned by individual shippers, which the Railroad Company are obliged to operate for such individual shippers; and fourth, there are sent into the coal region fuel supply cars of other railroad companies specially assigned to certain shippers to be loaded by such shippers and transported by the defendant Company. Prior to January 1st, 1906, only the general trade cars, or the first class mentioned, were in fact distributed to the general shipper
158 and the especially assigned cars were not charged up against the rating of the individual shipper to whom they were assigned. This, to our mind, manifestly led to unfairness in distribution and the Railroad Company itself adopted a different method, as shown by their general order of January 1st, 1906, as follows: "Commencing January 1st, 1906, assigned cars, i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be pro rated." In the light of this more equitable rule of distribution adopted by the Railroad itself in 1906 the table presented, which left out of calculation entirely all other cars than the general system cars, is not of much value to the Court and jury in this case in determining whether or not the defendant Company performed its duty to the plaintiff.

Now then, Gentlemen of the Jury, the law as we have laid it down to you must be treated by you as the law of this case. If wrong in the law, the Appellate Courts can correct the error. It is for you to apply the law to the facts and it is for you to decide what are those facts. Does the weight of the evidence convince you, first, that the plaintiff had a mine equipped and able to ship the coal which it claims it could have shipped; second, does the evidence satisfy you that the plaintiff Company had a market or trade within the State of Pennsylvania for the coal which it claims it could have mined and sold at a profit; third, does this evidence show that it made requisitions upon the defendant Company for cars and facilities for shipping coal up to its rating or some where near that rating; fourth, does the evidence show that the defendant Company failed
or refused to furnish the cars demanded, without legal or
159 equitable excuse; fifth, does the evidence show that the conditions of the bituminous coal trade were normal and that the defendant Company had a generally ample car supply for the needs of the coal business in normal times and under normal conditions? If you so find, then we say to you that the plaintiff has a

right to recover in this action in some amount and it is for you to assess that amount under the evidence which has been offered.

The burden of proof is put upon the plaintiff to show the elements of loss or damage sustained, and unless they have so shown loss or damage in dollars and cents, only a nominal amount could be assessed against them by the jury. The plaintiff in this case, however, has offered proof of loss or injury sustained because of the insufficient and inadequate supply of cars furnished, although they have not, as we said in an earlier part of the charge, offered any proof as to the elements of damage because of discriminatory acts. There are two distinct claims of injury here. First, it is alleged that the plaintiff suffered injury on all coal actually mined and sold f. o. b. cars at the mine between April 1st, 1903, and April 1st, 1907, for the reason that because of the inadequate and irregular supply of cars the coal actually produced cost per ton a considerable sum in excess of what it should have cost. Second, it claims the right to recover for all coal, during the same period, which it could and would have mined and sold f. o. b. cars at the mine, but which it was prevented from so producing and selling because of the inadequate and insufficient supply of cars.

To establish the first of these propositions, tables or schedules were offered showing the gross tons actually mined at this mine, for the period between April 1st, 1903, and April 1st, 1907, excepting the period of the flood and a later period during a strike, and the actual cost of producing that coal per gross ton. This was known as Exhibit No. 34, one of the tables which you had in your hands during the argument of Counsel, I think the last one placed in your hands. This table shows that during 1903 the production at this mine ranged from 3,434 tons in May to 8,300 tons in December. I could occupy a great deal of time on these tables, explaining them to you, but I think — the aid that was given to the jury in the argument and your inspection of those tables we will not make any extended comments. I will only call attention to a few of the items. In January, 1904, for instance, only 3,177 tons were mined, and the production ranges from that up to 10,933 tons in May. To produce the coal during that short tonnage of 3,177 they have what they claim their books show the coal cost per ton \$1.55, while to produce the larger amount in May they could produce it at one dollar. This could be used as an argument going to show that coal did cost more per ton when a small amount was produced. This for the reason, as alleged by the witnesses, that there were certain fixed charges of superintendence, etc., which no matter what the amount of coal produced had to be paid and if spread over a small amount would of course naturally make it much larger. For instance, in June, 1905, when 4,767 tons were mined, it cost \$1.55, and at a later period, in March, 1907, when 12,178 tons were mined it cost \$1.31. And on the other side, it could have been called to your attention that with 12,178 tons of actual output it cost them \$1.31, it is hardly likely they should have a basis of only \$1.08 as a theoretical cost of that coal. They have the theory that during the years of 1903 and 1904 the coal should have only cost them 96 cents per ton; that dur-

ing 1905 and 1906 it should have only cost them \$1.08 a ton, yet if this table is to be believed, as showing the facts here, when they produced 12,000 tons in March, 1907, the actual cost was \$1.31. You will recall, Gentlemen of the Jury, the evidence of the witnesses and the cross-examination of those witnesses, which show you exactly the elements entering into the estimates of what it would have cost.

Understand this 96 and \$1.08 are not based on actual work, 161 but is the theoretical basis of damages which you heard three witnesses I think, or more, swear were what they estimated this coal could have been produced — had they received their demand of cars or had they produced sixteen thousand some hundred tons per month. Now you remember also the cross-examination to show that that was an improper basis of calculation. For instance, I think the cross-examining Counsel showed that nothing was charged off for depreciation of the plant and, if I recall correctly, there was nothing charged off for coal which was put under the boilers to produce the steam to run the plant. The other elements entering into this estimate should be considered by you as to whether or not the estimates made by these gentlemen have a real basis of fact or can be considered by you as facts established. This schedule of loss on coal actually shipped shows that during the period claimed for 288,217 tons of coal were mined and they claim a loss on that of \$42,939.80. The facts set forth in the table are for your consideration, but are not binding on you, for if the cross-examination of these witnesses shows that their estimates are not reasonably fair or that there was left out of view certain elements which should have entered into that calculation, then it is for you to correct those estimates or make your own estimates. Was there then contingencies and uncertainties in the coal business not estimated in these tables? If there were, it is for the jury to take reasonable consideration of them.

Now as to the other elements of damages claimed in this suit, two tables are presented on behalf of the plaintiff. The first, known as Exhibit No. 33, which you had in your hands during the argument of Counsel, was argued to you as a proper estimate of the injuries sustained and shows a claim of \$144,258.35. The basis of this claim is the rating of the plaintiff's mine, from which is deducted the actual coal produced and shipped, less a few interstate shipments, thus showing a result in gross tons not shipped because of alleged 162 shortage in car supply. This tonnage, in monthly amounts, is multiplied by the loss per ton for each month, as shown by the difference between the average market prices per gross ton and the estimated cost of producing per gross ton, the same estimate as in the other table. The plaintiff is entitled to measure its damage in this respect by the difference between the cost of mining and delivering the coal on railroad cars, plus the royalty, and the fair average selling price for Sonman coal f. o. b. cars at the mines between April 1st, 1903, and April 1st, 1907, on all coal, which you find from the evidence produced, the plaintiff company could have reasonably been able to mine and sell f. o. b. cars at the mines except for the neglect or refusal of the defendant Company to furnish it with reasonably adequate facilities for loading and shipping coal. Both the original

table and the supplemental table presented on this branch of the claim are based on the law of damages which we have stated above. The theory of estimating damages therein is, therefore, the correct one for the purposes of this case, but the question for the jury with reference to these tables is, whether they have worked out that correct theory properly as applied to the facts, and you, Gentlemen of the Jury, are the judges of those facts. The tables themselves are not presented as proving any facts but as deductions from facts alleged by the plaintiff to have been proven. You have seen these tables and Counsel have argued the points respectively. About these tables we have the same comment as in the other table, namely, that the estimated cost per ton is claimed to be faulty in leaving out of consideration some of the elements which should have entered into it. It is also contended that the average market price claimed for in this statement is not warranted by the evidence going to show actual sales made.

Now one of the defenses offered on behalf of the defendant was some testimony from the distribution sheets, going to show
163 that for certain days during the period sued for no cars were in fact ordered, and also going to show that the car orders or requisitions for cars made by the plaintiff Company were not always up to its rating, and hence that this table first offered could not be sustained by the testimony. As we look at the law on that subject, we are of the opinion that the plaintiff Company can only recover on the basis of cars ordered and not upon its rating for each and every day during the period. In other words, it is estopped from claiming for its rating for such days as it did not order cars at all and can only recover for the amounts which it did in fact order. In view of this situation plaintiff has presented an alternative table, known as Exhibit No. 33A, in which it is shown the actual tonnage requisition month by month. The calculations otherwise are just the same as in the other table and the claim is reduced by that fact or the facts therein set forth to \$124,625.78.

Now then, Gentlemen of the Jury, these tables mentioned, were not offered and admitted as evidence of any facts contained therein. They are merely offered as the basis of or containing the elements of loss or damage sustained by the plaintiff, reasonably growing out of and deducible from the evidence offered. The distribution sheets of the defendant Company were offered in evidence as showing certain facts entering into these tables and the other evidence produced or alleged to have been produced here are made the basis of the several tabulations. The amounts claimed in both of these tables of damages are not the amounts which you must necessarily give to the plaintiff. If you believe, for instance, that the cost per gross ton estimated on the larger amounts is not a fair estimate, then it is for you to say whether or not that amount should be increased by one cent, two cents, five cents or ten cents, or whatever you may think is a proper estimate of the cost of production had the mine received the cars as shown by this rating. So also the actual selling
164 price. Are you satisfied from the evidence that the selling price of this coal in the market ranged from \$1.75, during

the first few months of 1903, down to \$1.50 during the balance of the year and for three months in 1904, and \$1.35 for the balance of that year? So also it is for you to say whether the plaintiff could reasonably have shipped day in and day out, as claimed, the amount of coal up to either its rating or to the amount for which requisition was made, without regard to the uncertainties and contingencies there may be in the coal business.

Now then, Gentlemen of the Jury, it is for you to make a fair estimate of what loss the plaintiff sustained by reason of unfair treatment, if you find there was unfair treatment practiced by the defendant. What it is entitled to is compensation for the loss or injury sustained because the defendant Company failed to furnish an adequate and sufficient supply of cars to its mine. The element of discrimination, that is, unfair treatment because of comparison with other shippers, is not pressed in this suit, although evidence was offered in relation to it. Plaintiff's Counsel have said to the Court, and in the presence of the jury, that no claim for discrimination, as such, is made, because they have offered no proof of such discrimination on which other than mere nominal damages could be assessed. The testimony on the subject of discrimination should not enter into your consideration, except as it may show reasons for the failure to furnish an adequate car supply. It should not, as Counsel for defendant seem to fear, have a tendency to prejudice your minds against the defendant or for that reason to enlarge this verdict. What you are to arrive at is an amount which will compensate plaintiff in dollars and cents for its loss because of the defendant's failure to do its common law duty of furnishing cars when demanded. Both branches of the loss alleged to have been sustained are recoverable, not, as I said before, the amount which is figured by the
165 plaintiff, but such an amount as you may think will compensate plaintiff for both elements of damage. When you have fixed on that amount, you have a right in addition thereto to allow such sum as you may think the plaintiff is entitled to for delay in the payment of that amount, not exceeding however six per cent. per annum. For instance, if you find that on both elements of damage the plaintiff sustained injury to the amount of, say, \$50,000, you would have a right to add an amount thereto as damages for delay in payment equivalent to six per cent., not as interest, for you are not allowed to assess interest on such claims, for such time as you think it reasonably could or should have been paid by the defendant. For instance, if it should have been paid a year ago, you would add to \$50,000, \$3,000, and in like proportions. That is wholly for you, and even whether you allow any part of it or any damages for delay is for you. I will explain in answer to a point more fully as to the elements which enter into that question. Your verdict, however, should be for a total sum of both elements of damages which it claims and whatever you may add for delay, must be fixed in a round sum.

Now Counsel have presented points on which they desire instructions. The plaintiff's points are:

No. 322.

SONMAN SHAFT COAL COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Motion for Judgment Non Obstante Veredicto.

Now February 27, 1912, Defendant Company moves the Court to have all the evidence taken at the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record.

(Signed)

MURRAY & O'LAUGHLIN,
Of Counsel for Defendant.

February 27th, 1912, Rules granted on each of above motions. Returnable first Monday of May next.

By the Court.

ALLISON O. SMITH, P. J.

27 February 1912 service of rules for new trial and for judgment n. o. v. accepted for plaintiff, and issue of rules waived.

(Signed)

A. L. COLE,
A. M. LIVERIGHT,
Pro Plaintiff.

Filed Feb. 27, 1912. John H. Moore, Prothonotary.

No. 322.

SONMAN SHAFT COAL COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Motion in Arrest of Judgment and Reason for New Trial.

February 27, 1912, Defendant Company moves in arrest of judgment and for a new trial for the following reasons:

First. The Court erred in the admission and rejection of evidence.

Second. The Court erred in the general charge and in answer to points.

Third. Because the verdict is against the entire weight of evidence and cannot be supported by the evidence in the cause.

Fourth. Because the verdict is against the law applicable to the case.

Fifth. Because the verdict is grossly excessive.

Sixth. Because of other errors and irregularities.

(Signed)

MURRAY & O'LAUGHLIN,

Of Counsel for Defendant.

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C. P., Clearfield County, May Term, 1909.

No. 322.

SONMAN SHAFT COAL COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Sur Motion in Arrest of Judgment and for a New Trial; also Sur Motion for Judgment Non Obstante Veredicto.

Opinion.

This case was tried at February Term, 1912, and the motions and rules in the above stated case were granted on February 27th. When the rules came up for argument at the regular June Argument Court, by agreement of counsel this case was continued until such time as the cases then in the Supreme Court of the State would be determined. Hence, the above rules were not argued until after the opinions in the cases of the Puritan Coal Mining Company and the Walnut Coal Company vs. the Pennsylvania Railroad were rendered at October Term of this year. This case was set for argument November 11th, 1912, and an oral argument heard, but the briefs of counsel were not submitted until within the last two weeks.

The general reasons set out in the motion in arrest of judgment and for new trial are:

1. The Court erred in the admission and rejection of evidence.
2. The Court erred in the general charge and in answer to points.
3. Because the verdict is against the entire weight of evidence and cannot be supported by the evidence in the cause.
4. Because the verdict is against the law applicable to the cause.
5. Because the verdict is grossly excessive.
- 173 6. Because of other errors and irregularities.

In the elaborate brief presented by the learned Counsel for defendant the above reasons are not specifically followed in their order, and in our discussion of the two motions and rules we will follow the order of the brief.

The first position taken by the learned Counsel for defendant is, that this State Court does not have jurisdiction to entertain the action. The plaintiff in this case, by its declaration, set out two causes of action, namely, first, discrimination proper, and second, insufficient and inadequate car supply in violation of the common law duty of a common carrier. The jurisdiction of this Court in cases of discrimination has been affirmed by our Supreme Court in Puritan Coal Mining Company vs. Pennsylvania Railroad Com-

pany, 237 Pa. St. 420, as also in *Walnut Coal Company vs. Pennsylvania Railroad Co.*, 237 Pa. St. 410. The recovery in the case in hand was based on the inadequacy of car supply only. While there was distinct proof of discrimination practiced by the defendant company, yet the data on which a recovery could be based was not furnished. The question in this case as to jurisdiction, therefore, is as to whether the Federal tribunals have exclusive jurisdiction over a matter of common law duty. The learned Counsel for defendant relies on the authority of *Southern Railway Co. vs. Reid*, 222 U. S. 424, which was a case involving a North Carolina statute, to sustain its position that the State Court in this case did not have jurisdiction of this cause. We fail to see how that case is applicable to the case in hand. The decision there is based on a square conflict between the North Carolina statute and the Act of Congress regulating Interstate Commerce. The question of the common law duty of furnishing an adequate car supply is not even referred to in the decision. That case moreover deals with the rate question rather than with the car supply question, and indeed in the matter of rates the Interstate Commerce Act seems to cover about all that can be said in the matter of regulating Interstate Commerce as to rates. All of the cases in fact in the United States Court, in which the jurisdiction of the State Courts has been denied, was based on a clear case of conflict between the provisions of a State statute and the Interstate Commerce Act. Where such conflict does not exist the express language of the 22nd section of the Act to regulate commerce, which reads as follows: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act in addition to such remedies" would seem to apply. In the case in hand, involving as it does the question of adequacy of car supply, a careful reading of the Interstate Commerce Act does not disclose to us any possible conflict of authority. The Federal Supreme Court, moreover, had distinctly recognized the right of redress in other jurisdictions, in the language of Mr. Justice White in the *Abilene case*, 204 U. S. 426-446, when he said "The manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative when other appropriate common law or statutory remedies exist for the redress of the particular grievance or wrong dealt with in the Act." Again, the United States Supreme Court, in *Galveston H. & S. A. R. Co. vs. Wallace*, 223 U. S. 481, upheld the jurisdiction of the State Court for damage caused by failure to deliver goods which was recognized as a common law breach of duty and not within the provisions of the Interstate Commerce Act. In that case the Court said, *inter alia*, "jurisdiction is not defeated by implication." The recovery in the case in hand was limited by the Court to intrastate shipments, including of course cars sold f. o. b. at the mines. It is hard to see how the question of exclusive jurisdiction in the United States Court could be made to apply to such shipments within the State and certainly no authority cited by the learned Counsel takes such a position.

175 Without further elaboration of argument, we think it is clear that the most recent authorities of both the State and Federal Courts sustain the right of the plaintiff to maintain this action.

Defendant's Brief contends:

"II. Defendant not in default because unable to supply all the cars demanded by plaintiff."

The elaborate argument of the learned Counsel in their brief under this head is not convincing that any error was committed by the Court. It ignores or glosses over a primary principle which should govern common carriers. The primary duty of a railroad company, in ordinary times and under ordinary conditions, is to have an adequate car supply for the needs of the country through which the lines pass and to furnish such cars to shippers when requisition therefor is made in good faith. In this respect the coal business does not differ from any other business, although the defendant railroad company seems to have taken the position that they have a right to regulate the coal market. The rule in this respect is clearly expressed in 5 Am. & Eng. Encyc. of Law, pp. 160 et al., as follows:

"The duty of carriers embraces, not only the duty to transport goods accepted by them, but to do so promptly and within a reasonable time. But in the case of railroads and similar companies, endowed with special and unusual powers with express view to their rendering to the public a freight and passenger service adequate to the needs of the country through which their lines pass, the law imposes the obligation to have and to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, and they are liable for a failure to transport promptly, whether the failure is due to a want of facilities or to a captious refusal to carry."

The only question in this case was whether the defendant fulfilled this duty, and the jury have decided that it did not. Both

176 the plaintiff and defendant in this case, by their proofs, sustained the verdict of the jury in favor of the plaintiff. There

was no contention, for instance, against the plaintiff's claim that it had a mine equipped and able to ship the coal which it claimed it could have shipped. There was no serious contention against the claim of plaintiff that it had a market or trade within the State of Pennsylvania for the coal which it claimed it could have mined and sold at a profit. There was no denial of the fact that the plaintiff made requisitions upon the defendant company for cars and facilities for shipping coal to a much greater extent than it received such facilities and nearly up to its actual rating by the railroad company. There was no denial that the railroad company absolutely failed or refused to furnish the cars demanded, and neither then nor now can give any legal or equitable excuse other than its claim that it had a right to prorate its cars and did not have a sufficient number to give everybody all the cars that were demanded. Further, the proofs on both sides show that the conditions of the bituminous coal trade were normal and the defendant company proved conclusively that it had a surplus of cars and in fact stored cars during a portion of the period. In the face of these admitted facts we are

wholly unable to see how there could be anything else than a recovery for such an amount in damages as the plaintiff has shown it sustained. The defendant company's Counsel took pains to prove conclusively that they had an adequate car supply for the needs of the business in the region. In the testimony of J. W. Manly, one of defendant's witnesses, page 250, appears the following evidence: "Q. Have you a record there for April 28, 1904? A. Yes sir. Q. What are shown to be the empty cars by that record to have been on the Pennsylvania Railroad lines, empty bituminous coal cars; they would be stored cars what I mean by that? A. We have on that date 900. * * * Q. Were or were not there unused and stored bituminous coal cars on the lines during the period of this 177 action? A. Yes sir." Then again, in the testimony of G. W. Creighton, General Superintendent, page 246, appears the following: "Q. During the time of this action from April 1903 to that time in 1907 was there any time when the bituminous coal equipment, any percentage of them were not being used by the shippers? A. I imagine there were, yes. By Mr. LIVERIGHT: We object to the answer and ask to have it stricken out. A. I can answer it positively. * * * Q. Were there coal cars stored and unused during that time? A. Yes." This testimony was offered by the defendant and the purpose for which it was offered was thus stated by Counsel: " * * * and that there were also empty cars, bituminous coal cars, on their tracks unused during the period proposed to be testified to. This for the purpose of showing that at the time — which the testimony is directed, at such period as the witness may testify to, there was an adequate equipment in the control and use of the Pennsylvania Railroad Company to furnish equipment for these shippers of bituminous coal." It was further proven by the cross-examination of G. E. Oler, defendant's witness having charge of the distribution records of the defendant company, the large number of cars each year which were not counted in the general allotment but which under the law should have been so counted. In view of this testimony it would seem that the defendant company had in view some other object in the bituminous coal trade rather than its duty as a common carrier. The elaborate argument of Counsel for defendant wholly ignores defendant's own proof in this regard and does not justify the claim that it had a right during the period to make a pro rata distribution, thereby ignoring the requisitions of the plaintiff. The defendant's Counsel assumes the proposition "that the demands of its shippers exceeded in the aggregate the cars which it had available for delivery to them," and hence that it was obliged to made a pro rata distribution in accordance with some fair 178 system. The proofs do not sustain such assumption, especially in view of the fact that idle cars were on sidings during the period. But even assuming the correctness of the statement, defendant company is not relieved. Their method of distribution does not disclose "a fair system." Moreover, discrimination or preference in car distribution of the rankest kind was shown, and this, in our judgment, the jury had a right to take into consideration in arriving at a conclusion as to whether the defendant did its full duty by the plaintiff in furnishing an adequate supply of cars. In-

dependent of the question of discrimination, however, the method of distribution in the region in which the plaintiff operated was to give it only a proportion of the unallotted cars after giving to the preferred shippers its full quota of individual, Pennsylvania Railroad fuel supply and foreign fuel supply cars. This method of distribution has not met the sanction of any court and cannot be made the basis of any defense against an action such as is here to be determined.

Defendant contends:

"III. No demand made by plaintiff for any other cars than those to which it was entitled under the system of distribution pursued by the defendant."

As we understand the argument of the brief under this head, it is that the plaintiff company did not show such demand as would indicate that it wanted any other distribution than the method of pro rata distribution followed by the defendant company during the period. The evidence clearly shows that the plaintiff company followed the method of making demand prescribed by the railroad company and through the proper sources. That the principal officers of the defendant company knew that the plaintiff company was not satisfied with its car service appears conclusively from the testimony of Mr. McCormick and Mr. Cameron, who even went so far as to approach personally the President of the railroad himself. What else they could do other than they did, it is hard to understand. The letter exhibits show an earnest effort to get cars and a protest against their treatment in not receiving them. This testimony without quoting it, is a sufficient answer to any controversy raised by the discussion under this head.

Defendant contends:

"IV. Rejection of testimony offered on behalf of defendant to prove the number of cars off the defendant's lines which would otherwise have been available for coal shipments."

It is hard for us to understand how the offer in question was competent in any phase of the case as tried. In the first place it was proven conclusively that the coal trade conditions during the period of the action *was* normal. In the second place it was proved conclusively by the defendant's own witnesses and purposely so proven, that they had an abundant supply of cars, so much so that unused cars were left standing on their sidings. In the third place, an adequate and sufficient supply of cars of the defendant company means of course that at any and all times there must be bituminous coal cars off the lines of the defendant company and on lines of other railroad companies doing a legitimate coal trade business. The offer does not attempt to show that during the period of the action there was anything extraordinary in the number of cars off their lines, and this only could be made as a basis of a defense. If they had an adequate and sufficient supply of cars for the legitimate coal trade, that presupposes a certain proportion of such adequate and sufficient supply of cars engaged in Interstate commerce and off the lines of the defendant company's road. In no sense then could it be a defense to the action merely to attempt to prove that

during the period of the action certain cars were off its lines and not available for distribution. In the ordinary course of trade and movements of cars the cars off defendant's lines would be returned, again to be distributed to the coal trade. The offer itself does not purport to include a proposition, which would be a legitimate defense to the claim of the plaintiff, that it was furnished an inadequate supply of cars, because the railroad company in this case took pains to show that the times were normal; that there was no extraordinary demand and no shortage of cars, in fact a surplus of cars. The proof moreover is conclusive that a very large number of cars during the entire period of the action were held by the defendant company for special distribution and also under an unfair system of distribution not allottable to the plaintiff company. In view of this proof, it seems to us wholly immaterial and unimportant what equipment the defendant had on foreign lines. If, as a matter of fact, the cars which it had on foreign lines were simply those in the ordinary course of trade and no greater during the period of the action than at any other time, it could not be a defense in any respect.

Defendant contends:

"V. Refusal of the Court to allow the witness, Frank J. Heverly, to testify as to the number of empty cars standing over at the plaintiff's mines, as shown by the distribution sheets."

The testimony involved in this offer is merely a repetition of the contents of the distribution sheets offered in evidence. The witness was not offered as an original witness of anything, but simply to repeat what he found on certain sheets. These distribution sheets were offered by the plaintiff and were admitted in evidence for all purposes for which they could be legitimately used by either side. The witness called to prove the facts about which complaint is made could not testify to anything other than appeared on the sheets, which he himself did not make up and knew nothing about except as it appeared on those sheets. Had the offer been to show a summary of certain facts appearing on the sheets, it might have been competent, because this was the method of procedure adopted in the course of this as well as other trials of a similar nature. But to allow the witness to merely repeat what appeared on those sheets neither gave the jury any light on the subject and was only encumbering the record with what was already thereon. The sheets being in evidence it was perfectly competent for counsel themselves in argument to the jury or to the court to use any summaries of facts contained therein. Counsel for defendant certainly understood this fully, for the same Counsel have been engaged in other cases of like nature and tables of all kinds have been used, both those prepared by Counsel themselves and those prepared by other persons and deductions made therefrom, which tables have uniformly been allowed for use of Counsel, the Court and jury. That, however, was not the proposition in this case. The offer, if we understood it at all, was simply to have a man, who knew nothing about the facts, testify to certain facts appearing on a sheet already in evidence. This would be like calling a witness to read a letter already in evidence.

For this reason the rejection of the offer was certainly a proper one. Just what bearing the testimony, if admitted, would have had or whether material is not now clear. As a matter of fact it was already in evidence from a host of witnesses that empty cars did stand over at the Sonman mine, partly due to the defendant's conduct in furnishing cars irregularly late in the day and also in part to the custom of coal mines in desiring to have cars stand over night so as to be ready for operation in the morning when the miners come to work. Moreover, the offer standing alone would not appear to be relevant. If the empty cars standing over were in fact used by the defendant company's employees as a reason for not furnishing cars on the following day, the testimony might have been competent and relevant. Nothing of that kind, however, was included in the offer. On the whole we see no error in the rejection of the testimony.

Defendant contends:

"VI. Erroneous submission to jury of question whether defendant had discriminated against plaintiff in the distribution of its cars."

The plaintiff's statement contained a count charging discrimination, as well as a count charging an inadequate and insufficient supply of cars. Considerable testimony was offered and admitted tending to show discrimination by the defendant company in favor of Berwind-White Coal Mining Company and against the operators of the Mountain Division, which would include the plaintiff corporation. This testimony, as shown in the letters and telegrams of the defendant railroad company's officers, was sufficient to establish a clear case of discrimination. The claim, however, for discrimination was not pressed and no sufficient data offered on which to base a recovery in that respect. We do not understand that the claim was withdrawn but that the plaintiff admitted simply that it had not furnished the data on which the jury could base a verdict for discrimination alone. They asked, however, for a verdict on account of the insufficient and inadequate supply of cars; in other words, the failure of the defendant company to recognize its common law duty of furnishing a sufficient supply of cars on demand. Defendant now complains of the following line of instruction by the Court to the jury, namely: "The testimony on the subject of discrimination should not enter into your consideration, except as it may show reasons for failure to furnish an adequate car supply." Defendant's Counsel now contend that there was no evidence to justify the jury in finding that the plaintiff had been discriminated against. We submit that no one can read this evidence, and especially the letters

and telegrams of the railroad officials directing special orders of cars to be served to the Berwind-White Coal Mining Company, without coming to the conclusion that discrimination of the baldest kind was practiced. Our view of the law in stating that the jury could take that evidence of discrimination into their consideration as one of the reasons why an inadequate supply of cars was furnished to the plaintiff, would seem to be correct. If they were discriminating favorably as to the Berwind-White Company and unfavorably as to the Mountain region, it would certainly account for some of the default of the defendant company in furnish-

ing cars to the plaintiff. Much more could have been said on the subject of discrimination under the proofs in this case. The little that was said was rather in favor of the defendant and if anybody has a right to complain, it seems to us that the plaintiff could with fairness complain that we treated the abundant discrimination proof somewhat cavalierly by disregarding it or making it of very minor importance. The proofs which show actual discrimination were admissible under either count and could not have been excluded, even though the Counsel at the beginning of the case had stated that they would not attempt to recover by reason of discrimination. So far as the Court is concerned the only reason why the matter of discrimination was not presented to the jury in full was that plaintiff failed to mathematically demonstrate the amount of injury sustained. We fail to see how the mild comment made by the Court on the subject of the discrimination proven could have hurt the defendant.

Counsel for defendant further contend in their elaborate brief that:

"VII. The charge of the court was inadequate and misleading in the sense that it over-stated the case of the plaintiff in the following material respects:"

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"A."

Briefly the complaint in "A" was that the Court misstated the proportion or percentage which the cars received bore to the cars ordered. An examination of the testimony or sheets offered would indicate that this contention is correct and that the Court did in a part of the charge state a lower percentage than actually is shown by the facts. The objection, however, should have been made at the time, when we would have gladly corrected the error. It is apparent too that the error is a legitimate result of merely glancing at the table, which was evidently before the Court at the time, and if before the Court was as fully before Counsel, because it appeared in a table prepared by plaintiff, a copy of which was at the same time furnished to the defendant. The duty of the defendant's Counsel to call attention of the Court to any error or misstatement of fact appears in a number of recent authorities, where it is held, that a party may not sit silent and take chances of a verdict and then if adverse complain of a matter which if error would have been immediately corrected by the Court. *Commonwealth vs. Razemus*, 210 Pa. St. 609; *Regnor Mfg. Co. vs. Railroad*, 233 Pa. St. 369; *Nowlis vs. Hurwitz*, 232 Pa. St. 154. The error of percentage stated was in a most casual reference in the following language: "If I had time, Gentlemen of the Jury, I would use more of these tables as I go along, but I think you understand that is the table in which they show the cars ordered in one column and the cars received in another column, drawing the comparison and showing, as I think Counsel argued, about 15 or 20 or 25 per cent. probably running during the period." The learned Counsel for defendant now say, in their brief, that the aggregate tonnage of cars ordered was 552,255 tons and the

actual shipments 277,169 tons or over 50 per cent. of the tonnage for which cars had been ordered. We do not now understand the discrepancy, but evidently the Exhibit before the Court at the time the above language was used was Exhibit No. 43, which shows during the period 14,352 cars ordered and 3,186 cars delivered, to which is added steel cars equal to two or 1,961 cars, making a total of 5,147 cars delivered, counting steel as two. The proportion of 5,147 to 14,352 is a little over 35 per cent. So that there appears to be a discrepancy between this table and the one to which Counsel refers. The error in figures doubtless came about by the Court's glancing at the head of the column rather than at the close of the column, because during the several early months of the period the percentage is about as stated in the charge, while during the later months the percentage of cars delivered or received to those ordered becomes much larger. This latter fact the testimony also shows was not due to any increased liberality on the part of the defendant company, but was because the plaintiff company in its crippled condition was compelled to resort to selling its coal to Berwind-White Coal Mining Company and the Keystone Coal Company and receiving from those companies their private cars for its coal supply. During the later period, therefore, while it did receive cars, they were not the cars of the defendant company but were cars for which it had to negotiate by selling its coal to other operators and competitors of the region. The misstatement of evidence referred to we do not think of sufficient importance under the circumstances to involve a new trial in this case.

"B."

The complaint in this point is that as the Court adopted the basis for the plaintiff's recovery the cars ordered by it and the testimony of a witness for the plaintiff, who was superintendent a part of the time during the period of the action, was to the effect that more cars were ordered than they could actually load an erroneous basis of recovery was permitted by the Court. We fail to see how the testimony of

Palmer, who was superintendent until October, 1904, is material in the light of the way in which the tables were presented and instructions of the Court. The record will show that the tables prepared by Counsel for plaintiff indicate that when cars were ordered in excess of the rating, the recovery was limited by the difference between cars received and the rating, and when less cars were ordered than the rating the recovery was measured by the difference between cars received and cars ordered. Two months taken from the table illustrates the point:

	Rating fixed by deft.	Tonnage requisitioned.	Tonnage shipped in cars rec'd.	Loss in tons
1903, Sept.....	16,080	19,075	4,941	11,139
1905, July.....	16,080	7,425	6,454	971

(See Plaintiff's Exhibit No. 33A, page 262 of typewritten testimony.)

In the general charge the Court directs the jury that recovery is limited to the ability on plaintiff's part to actually mine the coal, loss of which it claims the right to recover. So also plaintiff's fourth point predicates recovery upon preparation by it "to load or ship the additional quantity of coal which it claims the right to have loaded and shipped." Plaintiff's 5A point as a condition precedent to recover requires the jury to find "that if plaintiff was prepared and able to mine and ship the coal that it here claims the right to ship." In view of these instructions, it is hard to see how the jury could have been misled by anything referred to in this complaint under the head of "B."

"C."

Under this subdivision complaint is made that the Court did not sufficiently go into the minutiae of certain cost charges. In the first place, if the defendant had wanted instruction in such matters, it was at perfect liberty to present requests for instruction, which would have been gladly given. An examination of the charge shows that the Court made an effort to explain in considerable detail the
187 claims of defendant against the tabulated statements presented by the plaintiff. All such matters were matters of argument to the jury and I think were ably argued by Counsel on both sides. In a case of this magnitude, where such a wealth of detailed statements and tabulations are before the Court, it certainly could not be expected that in the charge every minute matter argued by Counsel could be specially referred to by the Court.

"D."

Under this head is the complaint that the charge was inadequate and misleading with reference to the selling price of the coal by the plaintiff company, in that the Court failed to call the attention of the jury that the price asked for was in excess of the actual prices received. We think the comments of the charge on the matter of price were ample, especially in view of the proof on the part of the plaintiff that because of the treatment received they were compelled to take reduced prices. This because they could not guarantee delivery and hence could not command the higher prices to the best customers. And again, because during the latter portion of the period sued for they were, as they claim, because of the insufficient car service, compelled to sell their coal to competitors, who of course took their profit. Counsel further enters into an exhaustive argument, that the Court failed to call the attention of the jury to the fact that had the car service been such as to furnish a car service equal to 100 per cent. of the rating the price of the coal would have been greatly reduced. This is an old argument, one used on behalf of the railroad company to justify their course of conduct in all such cases. The Counsel, at least, seem to be greatly exercised for fear the coal business will be demoralized and the price consequently reduced. For this reason they seem to want to regulate the coal business. As a large customer for bituminous coal, the real inter-

ests of the railroad company would lie in a reduced price.

188 The argument of Counsel, frequently made, that the furnishing of cars according to the duty of the railroad company would result in demoralization of the coal trade, is a pure creature of imagination raised up to justify the failure of defendant's officials to do their full common law duty to their shippers in the coal trade. The demoralization occasioned by the doing of its duty by the railroad company is purely imaginary. The coal trade would adjust itself like any other business in a very short time. Fierce and unnatural competition, sufficient to occasion demoralization, would soon vanish and it would be a question of the survival of the fittest along the most legitimate lines. Any other theory of the duty of a common carrier leads to rank discrimination and the greatest injustice to individual shippers, and the case in hand is an ample illustration of such injustice. According to the testimony, the plaintiff company had a splendid mine and a fine quality or grade of coal, its stockholders were men of standing and influence interested largely in concerns which were consumers of coal and satisfied with the product of the Sonman mine. The car service to plaintiff's mine was such, although times were normal, that the best of such orders were lost to plaintiff. A coal business, therefore, having the uncertainties and disastrous consequences amply proved in this case and wholly undenied, would be impossible and lead to inevitable bankruptcy to the strongest. The Counsel for defendant company as a matter of fact must recognize this situation and know that the conduct of the defendant in this and other cases has been indefensible. Practically no defense or excuse to the discrimination practice has ever been offered. In this case, on the question of an inadequate car supply to the plaintiff company during normal times absolutely no excuse or defense of fact was offered. The defendant's Counsel relied wholly upon principles of law which are untenable.

All of these complaints embodied under paragraph 7 as deficiencies or inadequacy of charge to the jury by the Court are

189 evidently picked out with great pains and industry on the part of Counsel since the trial of the case. Had specific instructions been asked for on any one of the matters alleged, Counsel certainly know that the Court would have acceded to such request. It is impossible in the limits of a charge to touch upon everything there is in a case of this magnitude. To expect of the Court in its charge what is here set out, without special request, would have been to expect the Court to make the argument, which was doubtless made to the jury at the time. If it was not, it was no fault of the Court.

We have thus followed the course of argument as appears in the brief filed by the learned Counsel for the defendant. We believe this brief covers practically all the reasons urged in the motion for new trial, except the one in which the verdict is alleged to be grossly excessive. This reason does not seem to be dwelt on by the learned Counsel in their brief, hence must be assumed to be abandoned by them. If the verdict is in fact grossly excessive, it should be set aside or reduced by the Court. The trouble with the verdict is in this case, that it is amply sustained by the evidence offered and the

mathematical calculations deduced therefrom. We do not care to invade the province of the jury except under special circumstances which are not apparent in this case.

On the whole case, therefore, we are not convinced that a new trial should be granted and certainly that no verdict for the defendant could be entered by the Court non obstante veredicto.

Decree.

Now, January 6, 1913, motions and rules for judgment non obstante veredicto, as also for arrest of judgment and for a new trial, are hereby overruled and discharged and judgment is directed to be entered on the verdict on payment of the jury fee as required by law. At request of counsel for Defendant exception is noted and bill sealed.

By the Court,
(Signed)

ALLISON O. SMITH, P. J.

Filed Jan'y 6, 1913.

JOHN H. MOORE,
Prothonotary.

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No. 30, January Term, 1913.

SONMAN SHAFT COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Appeal from Court Common Pleas of Clearfield County.

VIII. *Assignment of Error.*

1. The Court below erred in charging the jury as follows:

"It is first contended on behalf of the defendant that the said court does not have jurisdiction, for the reason that the United States Congress has conferred entire jurisdiction upon the Federal Courts or other tribunals established by Congress, and that hence there is no right of recovery for any failure of duty in furnishing car facilities in the State Courts, of which this is one. This contention, as you have noticed, we have overruled."

(Page 16.)

2. The Court below erred in charging the jury as follows:

"It is again further contended that only such portion of the coal which may have been or was intended ultimately to be delivered within the State of Pennsylvania could be recovered in this action. With this contention we also disagree with the learned Counsel and hold that where coal is sold f. o. b. cars at the mines it is a Pennsylvania delivery and that the right of action is in the State Courts for failure of a common carrier to perform its common law or statutory duty."

(Page 16.)

3. The Court below erred in affirming the plaintiff's sixth point, this point and the answer thereto being as follows:

"(6.) If the Jury find that the plaintiff is entitled to recover from the defendant, it is entitled to a verdict for whatever damages it appears from the evidence it sustained by reason of the wrongful acts of the defendant, upon all coal which was mined and sold f. o. b. cars at its mines between April 1, 1903 and April, 1907, or which in that period could and would have been mined and sold f. o. b. cars at Sonman mine, but for the wrongful acts of the defendant."

Answer. "Affirmed."

(Page 28.)

4. The Court below erred in refusing to charge as requested in the defendant's fifteenth point, this point and the answer thereto being as follows:

"15. The plaintiff's right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, to points inside the State of Pennsylvania and there can be no recovery in this action for damages, if any, resulting from the plaintiff's inability to sell coal f. o. b. cars at its mines consigned by it to points outside the State of Pennsylvania."

Answer. "That point is refused."

(Page 36.)

5. The Court below erred in charging the jury as follows:

"It is further contended on the part of the defendant that the rule of law to which we have heretofore referred which requires a common carrier in ordinary times and under ordinary conditions to have and furnish an adequate and sufficient supply of cars, does not mean that the common carrier is bound to furnish just the number of cars demanded or for which requisition is made by an individual shipper, as was this plaintiff. It is contended in its behalf that the defendant, as a common carrier, had a sufficient and adequate supply of cars for ordinary times in the coal trade as a whole, but that because, taking the whole number of shippers in the region, the demand far exceeded the supply, and, as they infer, would exceed the necessities of the trade, they were obliged to, and in fact did, apportion or allot their coal cars according to a pro rata schedule based on the ratings of the several mines. With this contention we do not agree. The result of that contention, worked out to its logical conclusion, would lead to the undue and unreasonable discrimination expressly forbidden."

(Page 17.)

6. The Court below erred in charging the jury as follows:

"As we look at the matter, a person, a firm or a corporation has a right under the law to buy or lease a coal property along the line of a railroad, to open up that property for shipping coal, to provide an equipment according to the acreage and output intended to be shipped, and has then a right to demand from

the common carrier the necessary facilities to carry on the business according to the requirements of that mine. He has a right to take his chances in the market along with everybody else, and it is not the business of the common carrier to try to regulate and control the output of coal so that the market for coal can be controlled in either quantity or price. For this reason we, therefore, refused to allow the defendant to prove that the very customers which plaintiff alleges he lost by reason of the irregular and insufficient car supply were in fact supplied by someone else on the Pennsylvania lines."

(Page 17.)

7. The Court below erred in refusing to charge the jury as requested in the defendant's fifth point, this point and the answer thereto being as follows:

"5. The plaintiff can, in no event, recover for an alleged shortage in the number of cars furnished it beyond what its pro rata share of cars would have been under the established system of distribution."

Answer. "That point is refused for the reason that there is no testimony to show that there was any abnormal condition in the coal business entitling the defendant to refuse a bona fide demand for cars."

(Page 31.)

8. The Court below erred in refusing to charge the jury as requested in the defendant's twelfth point, this point and the answer thereto being as follows:

"12. The evidence does not disclose any general shortage of equipment on the part of the defendant, and, accordingly, the plaintiff cannot recover for the failure of the defendant to furnish
194 cars in excess of the plaintiff's allottable share of the equipment of the defendant available for distribution under the defendant's system of distribution in effect during the period of the action."

Answer. "That point is refused."

(Page 35.)

9. The Court below erred in refusing to charge the jury as requested in the defendant's second point, this point being as follows:

"2. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should, therefore, be for the defendant."

(Page 30.)

10. The Court below erred in sustaining the objection made upon behalf of the plaintiff to the defendant's offer of testimony which is embodied in the following offer made by its counsel:

"The defendant offers to prove by the witness on the stand that during all of the period of this action the defendant had in effect on and for shipments of bituminous coal through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on

the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive.

195 "Mr. LIVERIGHT: Objected to, first, as immaterial and irrelevant, second, as being no answer to the complaint made in this case or the testimony adduced in this case; and third, as being entirely inconsistent with their own testimony that they have already put in.

"The COURT: Objection sustained, evidence excluded, exception noted and bill sealed for defendant."

(Appendix, page 417a.)

11. The Court below erred in overruling the motion of the defendant to dismiss the action for want of jurisdiction to entertain the same.

(Appendix, page 464a.)

12. The Court below erred in overruling the motion of the defendant for judgment non obstante veredicto.

(Appendix, page 485a.)

13. The Court below erred in entering judgment on the verdict in favor of the plaintiff.

(Appendix, page 485a.)

196 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 30.

Filed June 27, 1913.

SONMAN SHAFT COAL COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Appeal by Defendant from the Judgment of the Court of Common Pleas of Clearfield County.

MESTREZAT, J.:

The elaborate opinion of the learned trial judge denying the motion for a new trial and for judgment non obstante leaves nothing that can be profitably said in support of his conclusion sustaining the judgment from which this appeal was taken. We need but state briefly the facts and the issues involved.

This is an action of trespass brought by a coal operating company against the defendant, a common carrier, to recover damages for an unlawful discrimination in the distribution of coal cars against the plaintiff company and for failure to furnish it an adequate and sufficient supply of cars under ordinary trade conditions. Both claims are based on the duty of the defendant as a common carrier, imposed by the common law and our constitution and statutory law. The claim for discrimination was not pressed and the case went to the jury on the claim for damages for failing to furnish an adequate supply of cars. This was divided into two parts: (a) damages for loss of profits on coal not mined because cars were not furnished to ship it, and (b) damages for the increased cost per ton of producing the coal mined over what the cost per ton would have been had cars been furnished sufficient to ship up to the actual capacity of the mine.

The defendant denied its liability because the court below did not have jurisdiction of the action, only such portion of the
197 coal which was intended ultimately to be delivered within the state could be recovered for in this action, defendant was not bound to supply all the cars demanded by the plaintiff, and plaintiff demanded only its pro rata share of the cars, which it got. The court ruled the two questions of law against the defendant and submitted the case to the jury who returned a verdict for the plaintiff on which judgment was entered. The defendant has appealed.

The case was carefully tried and was submitted to the jury in a clear and comprehensive charge reviewing the testimony and directing attention to all the questions of fact involved. It would serve no good purpose to examine and discuss the large amount of evidence produced at the trial. It is sufficient to say that after a painstaking examination of it all, we are satisfied that it warranted the finding of the jury.

The defendant company renews its contention here that the court below had no jurisdiction to entertain the action. It also contends that it was not in default because it was unable to supply all the cars demanded, that plaintiff made no demand for any cars other than those to which it was entitled under the defendant's distribution system, and that the court erred in excluding testimony offered to prove the number of cars off defendant's lines which would otherwise have been available for coal shipments. In an exhaustive opinion overruling the defendant's motion for a new trial and for judgment non obstante, the learned judge of the trial court deals at length with each of these propositions and shows that they are without merit. He points out that so far as they depend upon the facts, the finding of the jury against the defendant is amply sustained by the evidence. Under the well settled rule, this court cannot interfere with the jury's finding.

The controlling question of jurisdiction, a question of law, is dealt with by the court in its opinion, and the Federal cases, with the exception of one or two recent decisions, and our two
198 recent cases bearing on the question are cited, and sustain the learned judge's conclusion. We think it unnecessary to

discuss this question as we must sustain the jurisdiction or overrule our own two very recent decisions in *Puritan Coal Mining Company vs. Pennsylvania Railroad Company*, 237 Pa. 420, and *Walnut vs. Pennsylvania Railroad Company*, 237 Pa. 410, which were ruled expressly on the authority of the Supreme Court of the United States. This we have no intention of doing. The *Puritan* and *Walnut* cases were brought against the defendant in the present case and were to recover damages for unlawful discrimination and failure to furnish plaintiff with an adequate and sufficient car supply. In both cases, the defendant denied the jurisdiction of the court and relied on the Federal authorities, with the exception of one or two recent cases, cited and relied on here, to oust the jurisdiction of the state court. The jurisdiction was sustained, and it was there held that where the act is an offense at common law, and made so as well by State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts. In an exhaustive opinion in the *Puritan* case Mr. Justice Stewart, speaking for this court, says that the boundary line limiting state jurisdiction in matters which may affect Interstate Commerce has been clearly indicated by repeated decisions of the Supreme Court of the United States within recent years, and after reviewing the decisions continues (p. 453): "Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the State, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the commerce commission specifically directed 199 against the particular matter complained of. The thing condemned by our State statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the *Missouri Pacific Ry. Co. v. Larabee Flour Mills*, 211 U. S. 612. The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offence was committed within the State."

We are of the opinion that this case was properly disposed of by the learned court below and, therefore, the judgment is affirmed.

200 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
VS.
SONMAN SHAFT COAL COMPANY, Defendant in Error.

COMMONWEALTH OF PENNSYLVANIA.

County of Clearfield, ss:

On this 23rd day of September in the year of Our Lord one thousand nine hundred and thirteen, before me the undersigned a Notary Public in and for the said County and State, resident at Clearfield, Pennsylvania, personally appeared Jas. P. O'Laughlin who being duly sworn according to law doth depose and say that he served a copy of the Specifications of Error of the Plaintiff in Error in the proceeding in error to the Supreme Court of Pennsylvania, upon Alfred M. Liveright of the attorneys of record for the said Sonman Shaft Coal Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Specifications of Error, on the 23rd day of September A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September A. D. 1913.

[Seal of Walter Welch, Notary Public, Clearfield, Penna.]

WALTER WELCH,
Notary Public.

Commission Expires Feb. 21, 1915.

201 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 30.

SONMAN SHAFT COAL COMPANY

VS.

THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe Indicating the Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

Pursuant to Section 1 of Rule 8 of the Rules of Practice of the Supreme Court of the United States, you are respectfully requested

to incorporate into the Transcript of the Record to be certified to the Supreme Court of the United States, and there filed in connection with the Writ of Error heretofore sued out from the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the Record:

202 1. Original statement of plaintiff's claim (printed on page 444a et seq. of the Appendix to Appellant's Paper Book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "A").

2. Plaintiff's amended statement (printed on page 457a et seq. of exhibit "A" hereto attached).

3. Defendant's motion to dismiss action for want of jurisdiction (printed on page 462a et seq. of exhibit "A" hereto attached).

4. Action of Court over-ruling motion to dismiss as follows: "Now, February 19, 1912, motion to dismiss is over-ruled. Exception noted for defendant. By the Court, Alison O. Smith, P. J." (Printed on page 464a of Exhibit "A" hereto attached).

5. The following excerpts from the testimony:

The testimony of Vance C. McCormick (printed on pages 23a to 96a inclusive, and on pages 176a to 193a inclusive, and on pages 433a to 436a inclusive of exhibit "A" hereto attached). Also plaintiff's exhibits No. 33 and 34 filed with the testimony of the said Vance C. McCormick (printed on pages, 437a, 438a, 439a and 440a of exhibit "A" hereto attached).

The testimony of Ira Jones when recalled on the part of the defendant (printed on pages 397a to 399a inclusive of Exhibit "A" hereto attached).

The testimony of George W. Creighton as printed on pages 401a and 402a of Exhibit "A" hereto attached, beginning with the question on page 401a "Q. Mr. Creighton, in the distribution of cars to a shipper is there or is there not any designation as to what use, meaning by that to what points of shipment the lading shall go, that the shipper shall use them for?" and ending with the answer on page 402a "A. Except they go in some designated route. Cars in New England would be a given kind of car. Our cars might go to some destination, but we never restricted them as to State or Interstate."

The testimony of M. Trump, (printed on pages 408a to 422a inclusive of Exhibit "A" hereto attached).

The testimony of G. E. Oler (printed on pages 423a to 431a of Exhibit "A" hereto attached, including defendant's exhibit No. 6).

6. Charge of the Trial Court (printed on page 9 et seq. of Appellant's Paper Book, a copy of which is hereto attached and marked Exhibit "B").

7. Plaintiff's point-No. 6 (printed on page 28 of Exhibit "B" hereto attached).

8. Defendant's points Nos. 2, 5, 12, 14 and 15 (printed on pages 30, 31, 35 and 36 of Exhibit "B" hereto attached).

203 9. Verdict of the jury and judgment thereon (printed on page 42 of Exhibit "B" hereto attached).

10. Motion for judgment non obstante veredicto (printed on page 466a of Exhibit "A" hereto attached).
11. Motion in arrest of judgment and reason for a new trial (printed on page 465a of Exhibit "A" hereto attached).
12. Opinion of the trial Court sur defendant's motions for arrest of judgment and for a new trial, and for judgment non obstante veredicto (printed on page 468a et seq. of Exhibit "A" hereto attached).
13. Decree of trial Court sur said motions (printed on page 485a of Exhibit "A" hereto attached).
14. Appellant's assignments of error in the Supreme Court of Pennsylvania (printed on page 42 et seq. of Exhibit "B" hereto attached).
15. Opinion of the Supreme Court of Pennsylvania affirming the judgment of the court below.
16. Petition filed by the plaintiff in error with the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, praying for the allowance of a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States.
17. Action of the Honorable D. Newlin Fell, Chief Justice, allowing the writ of error.
18. Writ of error on appeal to the United States Supreme Court.
19. Specifications of error filed by the plaintiff in error.

FRANCIS I. GOWEN,

Attorney for the Plaintiff in Error.

204 COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this 23rd day of September, in the year of our Lord, one thousand nine hundred and thirteen, before me, the undersigned, Prothonotary of the Court of Common Pleas of said County, personally appeared Jas. P. O'Laughlin, who being duly sworn according to law doth depose and say that he served a copy of the foregoing Præcipe upon Alfred M. Liveright, of the attorneys of record for the said Sonman Shaft Coal Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Præcipe and of the exhibits thereto attached, on the 23rd day of September, A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September, 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE, *Proth'y.*

205 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true and correct copy of the

Record in the above entitled cause, so full and entire as is indicated by the attached præcipe.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of October, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

206 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Alfred B. Allen, was, at the time of signing the annexed attestation, and now is Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 11th day of October, one thousand nine hundred and thirteen.

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 11th day of October, one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

1 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 30.

SONMAN SHAFT COAL COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania:

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Sonman Shaft Coal Company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad Company, on September 23, 1913 served a copy of the præcipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter præcipe of the defendant in error; that by inadvertance, counsel for the defendant in error failed within 10 days of service upon them of the præcipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter præcipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter præcipe may be enlarged by a Judge of the Court whose decision is made the subject of review, or by a justice of the United States Supreme Court.

2 Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their præcipe until the 6th day of December, 1913.

And they will ever pray.

A. L. COLE.

A. M. LIVERIGHT.

STATE OF PENNSYLVANIA,

County of Clearfield, ss:

A. M. Liveright, one of the petitioners, being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

A. M. LIVERIGHT.

Subscribed and sworn to before me this 15 day of November, 1913.

[SEAL.]

JAMES K. HORTON,
Notary Public.

My commission expires March 14, 1915.

8 *Order of Court.*

And now 17th day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Sonman Shaft Coal Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the præcipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as a part of the transcript of the record and be therein incorporated.

JNO. P. ELKIN,
Justice of Supreme Court.

4 Endorsement: In the Supreme Court of Pennsylvania (Eastern District)—No. 30 January Term 1913—Sonman Shaft Coal Company vs. Pennsylvania Railroad Company—Petition in re Record on Writ of Error to United States Supreme Court—Presented in Chambers Nov. 17, 1913 and within order made. Jno. P. Elkin, Justice Supreme Court. Filed Nov. 26, 1913. A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

5 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 30.

SONMAN SHAFT COAL COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe of Defendant in Error Indicating Additional Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

In addition to the portions of the record called for by the plaintiff in error, you are respectfully requested to incorporate into the transcript of the record to be certified to the Supreme Court of the

United States, and there file in connection with the writ of error heretofore sued out in the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the record.

A. L. COLE,
A. M. LIVERIGHT,
Att'ys for Defendant in Error.

(1) Excerpt from the testimony of E. F. Saxman, beginning at page 4a and continuing to the words "It is between the mine and Johnstown", at the third line from the top of page 10a in Exhibit "A" attached to præcipe of plaintiff in error.

(2) Testimony of J. M. Cameron, pages 62a to 68a of said Exhibit.

(3) Testimony of Vance C. McCormick, pages 68a to 96a inclusive, of said Exhibit.

(4) Excerpt from the testimony of James Stran, beginning with the words "How many empties could be placed above the tippie, to be dropped under the tippie for loading purposes?" at line 3 page 111a, to the words "Noon recess" on page 113a of said Exhibit.

(5) Excerpt from the testimony of James B. Neale, beginning at page 144a with the words "What connection have you had with the Sonman Shaft Coal Company" to and including the words "By the general shortage" at line 19, page 145a of said Exhibit.

Excerpt from the testimony of same witness, beginning "By Mr. Liveright", page 152a and continuing to the end of that page.

6 (6) Excerpt from the testimony of J. A. Jardine, page 159a of said Exhibit, as follows:

"Q. What do you say was the condition of the market as to the demand for bituminous coal in the years from April 1st, 1903 to April 1st, 1907, was it normal or abnormal?

A. There was nothing abnormal about the business during any of that time. We were actively engaged in buying and selling coal, besides mining coal, so I am well acquainted with the conditions."

(7) Excerpt from the testimony of John W. Rockwell, page 172a of said exhibit, as follows:

"Q. In the period I have mentioned, 1903 to 1907, what do you say was the condition of the market for demand for coal, was it normal or otherwise?

A. It was normal."

(8) Excerpt from the testimony of James Van Pelt, page 175a of said Exhibit, as follows:

"Q. What was the condition of the market in relation to the demand for coal in the period from 1903 to 1907, that is to say, was it normal or otherwise?

A. I considered it to be about normal."

(9) Excerpt from the testimony of Frank H. Palmer, beginning at page 194a and continuing to the words "Yes sir" on the third line of page 196a of said Exhibit.

(10) Excerpt from the testimony of M. Trump, beginning with the question on page 233a, "I show you papers marked Plaintiff's

Exhibits from 21 to 30 inclusive, and I ask you what they are in a general way; whether they are orders for the distribution of cars or what they are?" to and including the answer "I think so, yes" at the fourth line from the foot of page 238a of said Exhibit.

(11) Excerpt from the testimony of H. L. Spottswood, beginning at page 243a to the words "I will get you the papers you want" at the fifth line from the foot of page 244a of said Exhibit.

(12) Testimony of E. F. Saxman, pages 269a and 270a of said Exhibit.

(13) Testimony of H. L. Spottswood, page 314a to 317a inclusive, of said Exhibit.

(14) Excerpt from the testimony of Vance McCormick, beginning with question at foot of page 329a to the end of the question terminating with the words "after that" on line 11, page 330a of said Exhibit.

(15) Excerpt from the testimony of G. W. Creighton, beginning with the words "During the time of this action" near the top of page 403a and extending to and including the word "Yes" at the seventh line from the foot of the same page in said Exhibit.

(16) Excerpt from the testimony of J. W. Manly, beginning at the top of page 408a and continuing to the end of his testimony on the same page of said Exhibit.

7 (17) Plaintiff's Exhibit No. 43 at page 432a of said Exhibit "A."

(18) Plaintiff's points numbers 1, 2, 3, 5, 7 and 8 and the answers thereto at pages 26, 27, 28 and 29 of Exhibit "B" attached to the præcipe of the plaintiff in error.

(19) Defendant's points 3 and 4 at page 31 of said Exhibit "B" of plaintiff in error.

(20) History of the case at pages 3, 4 and 5 of Exhibit "C" hereto attached and made part of the præcipe of the defendant in error.

Endorsement: No. 30 January Term 1913—In the Supreme Court of Pennsylvania, Eastern District—Sonman Shaft Coal Company vs. Pennsylvania Railroad Company, Appellant—Præcipe of defendant in error—Filed Nov. 26, 1913 in Supreme Court—A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

8 E. F. SAXMAN, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Philadelphia.

Q. In what business are you?

A. The coal business.

Q. How long have you been so engaged?

A. All my life.

Q. Were you at any time connected with the Sonman Shaft Coal Company?

A. Yes sir.

- Q. Where?
- A. At Sonman
- Q. In what capacity?
- A. As Vice President and General Manager.
- Q. What were your duties as General Manager?
- A. To produce the coal.
- Q. Where were you located?
- A. I lived then at Latrobe.
- Q. How far from Sonman?
- A. About 50 miles I think.
- Q. Where is Sonman?
- A. In Cambria County, near Portage.
- Q. Where was your office as General Manager?
- A. At Latrobe.
- Q. How long did you occupy that position?
- A. From the time we started, which I think was in 1889, I will look. The Company was organized in 1889.
- Q. 1889 or 1899?
- A. 1899 and I sold out about January, 1904, I think.
- Q. In April, 1903, what position did you occupy with the Company?
- A. The same position.
- Q. Who was your superintendent at that time?
- A. I don't know that I can tell you.
- Q. Who was the mine foreman?
- A. Mr. Stran, I think.
- Q. James Stran?
- A. James Stran, yes.
- Q. Your immediate subordinate was the superintendent, was he?
- A. Yes. I think probably at that time my brother was there.
- Q. How much coal did you have under control at Sonman mine in 1903?
- A. About, if I recollect, 1,000 acres.
- Q. How much?
- A. I think 1,000 acres, I am not just sure.
- 9 Q. How was it operated?
- A. From a shaft.
- Q. Where was that shaft located with reference to the main line of the Pennsylvania Railroad?
- A. It was right on the old main line, and when they changed the new main line we were then well on to a mile away from it.
- Q. How is the plant connected with the main line of the Pennsylvania Railroad?
- A. We connect at Portage now.
- Q. You have a siding, do you?
- A. Yes, the old main line from Portage is up to the mine, yes sir.
- Q. How far distant is the tipple from the main tracks of the Railroad Company?
- A. A couple hundred feet.
- Q. That is from the old main line?
- A. From the old main line.
- Q. How far distant from the present main line?

A. I would hardly know. I would say half a mile. It might be more, but I can't tell you that. It has been a good while since I have been up there. I haven't been up there since I sold out.

Q. How deep is the shaft?

A. 325 feet.

Q. How thick is the coal?

A. It runs a little over three feet.

Q. What vein?

A. We were mining the Miller seam. We had the Lemon seam underneath also but had to give it up.

Q. The Miller seam is also known as the "B" seam, is it not?

A. Yes, "B" seam or Miller seam.

Q. What kind of equipment did you have in your mine in 1903?

A. We had an electric haulage, hauled by electricity.

10 Q. How was the coal raised?

A. By a cage.

Q. How was the cage operated?

A. By a steam engine.

Q. Where was that steam engine located?

A. Right next the shaft.

Q. What was the capacity of your engine and boilers?

A. We had I think about between 500 and 600 horse power boilers.

Q. How was the coal hauled from the face of the workings to the cage?

A. By electricity.

Q. Did you have any other haulage there besides that?

A. No, only mules. We gathered with mules.

Q. Gathered the coal to the haulways or gangways with mules, then transported it with motor?

A. Yes sir.

Q. What development work had been done in 1903?

A. I don't believe I can answer that question without going and looking at the maps and I haven't refreshed my memory as to that.

Q. What was the capacity of the mine to produce coal in 1903, had it had adequate place to put that coal?

Mr. O'LAUGHLIN: We object to the question if it relates to any part of 1903 prior to April 1, as incompetent, irrelevant and immaterial.

By Mr. LIVERIGHT:

Q. From April 1st, 1903, onward?

A. The history of the mine when I opened it up, I started in and laid it out.

Mr. O'LAUGHLIN: We further object to the question because this witness is not shown to be competent to answer the question from his technical knowledge as to the coal not mined in actuality and the coal relates to coal not actually or physically mined.

11

By Mr. LIVERIGHT:

Q. Do you hold a mine foreman's certificate?

A. I do.

Q. Now answer the question.

The COURT: The fact that he holds a mine foreman's certificate wouldn't make him competent, unless he knew the inside workings of this mine as to the question involved.

By Mr. LIVERIGHT:

Q. How often did you go to the mine?

A. I can [not] answer that question.

By the COURT:

Q. What do you know about the capacity in April, 1903?

A. The mine was equipped then to hoist 1,000 tons a day easily.

By Mr. LIVERIGHT:

Q. Do you know whether it was sufficiently developed inside to produce that much coal?

A. Yes, I think it was, I am sure it was.

Q. Do you know how much it actually did produce on any one day during your incumbency there?

A. The largest month we ever had I think was eleven thousand some odd tons. 11,000.

Q. Why didn't you get out more coal?

A. We couldn't get the cars to load the coal.

Q. What kind of cars?

A. Railroad cars.

12 & 13 Q. What effort did you make to get them?

A. There was every effort made.

Q. How did you direct your efforts?

A. They were all directed through Altoona, and Mr. McCormick and Mr. Cameron, our President and Treasurer, were attending to that more than I did, except the every day work. I telephoned to Altoona quite frequently, I don't say every day but quite often. My superintendent would go to Altoona every day or two and beg for cars and I have been to Altoona.

Q. To whom did you telephone?

A. Mostly to Mr. Steele.

Q. Do you know what his position was with the Railroad Company?

A. Train Master. I have taken the matter up with Mr. Ed. Pitcairn of Pittsburg too very seriously.

Q. What position did he hold with the Company?

A. He was train master. Mr. Steele I believe was Assistant Train Master.

Q. Did you know of any other source to which to apply for car supply?

A. There probably could have been a higher source I didn't personally apply to, but other members of our Company did apply.

Q. Was this the customary place to make application?

A. Yes sir.

Q. What Division were you on?

A. On the Pittsburgh Division I think it is called.

Q. How far from the South Fork and Scalp Level Branch?

A. I would say 15 miles.

Q. What mines are located on that Branch?

A. Mostly the Berwind-White mines.

Q. 15 miles across country do you mean?

A. Yes.

Q. Or 15 miles on the tracks?

A. No, I think 15 miles across the country would reach it. I don't know just the mileage on the tracks. It isn't very far though. It is between the mine and Johnstown.

* * * * *

14 J. M. CAMERON, called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What position in the Sonman Shaft Coal Company did you hold in 1903?

A. I was President of the Company.

Q. For how long did you continue in that office?

A. Until February 6th, 1906.

Q. Thereafter were you connected with it?

A. No, I resigned as President and Director and sold my interest in the Company.

Q. State whether or not you had any interview in 1903, or thereafter, with officers of the Pennsylvania Railroad Company with reference to car supply at Sonman Shaft?

A. Yes sir, we had repeated interviews ever since 1899.

Q. Now direct your attention to 1903?

A. Well I was present at the interview Mr. McCormick has testified to with Mr. Cassatt and I can confirm what Mr. McCormick has said about that.

Q. What was the conversation between them?

A. After the correspondence with him we went to talk to him about the treatment we had been getting there, and I remember very distinctly that I told him that one great thing that we had to complain of was that out of the car supply of the Pennsylvania Railroad there had been taken a thousand cars and those cars had been sold to Berwind-White Coal Company, and I remember just as distinctly Mr. Cassatt was rather annoyed at that, and he said, oh! well that doesn't matter to you we would have given them to him any-way, and I remember we talked generally about the reasons of the Pennsylvania Railroad for keeping the big shipper going, and I think Mr. Cassatt finally said he would have the thing looked into and he did have somebody report to him on it and that is all that ever came of it.

Q. Did you have any interviews with other officers besides Mr. Cassatt on the same subject?

A. Yes, I had interviews with Mr. Cassatt, Mr. Prevost, Mr. Pugh, Mr. Trump and Mr. Wallis, and I don't know who all.

Q. Mr. Creighton?

A. I don't know that I ever had any personal interview but I have correspondence with Mr. Creighton.

Q. Where were these interviews?

A. They were Altoona and Philadelphia. I don't say that all these were after the 1st of April, 1903, Mr. Liveright. My patience had become somewhat exhausted by that time and I had come to the conclusion there was very little use of saying anything to the Pennsylvania Railroad officials about the matter. It was evident to me we weren't going to get the cars.

Mr. BIKLE: We ask this be stricken out after he doesn't know it was after the 1st of April 1903. It was voluntary. Mr. Liveright's question was specifically before April 1st, 1903. Let there be a direct ruling on that point, that evidence with reference to conditions prior to April 1st, 1903, goes in or goes out.

16 By the COURT:

Q. What do you say now as to whether or not these interviews you mentioned other than those referred to by Mr. McCormick after April 1st, 1903, were before or after?

A. Some of them I know were before.

Q. Some of them were before?

A. Yes, I don't recollect about all of them. I know Mr. Cassatt's was afterwards.

The COURT: The testimony with reference to interviews preceding April 1st, 1903, we think are incompetent and should be stricken from the record and disregarded by the jury.

By Mr. LIVERIGHT:

Q. Do you know anything about the demand for coal?

A. Yes, I know in the year beginning April 1st, 1903, there was a very good demand and prices were high.

Q. For your coal?

A. For Sonman coal, yes. Generally the demand through the entire period that I was connected with it was all that we could ask.

Q. Who was inquiring for your coal?

A. We had inquiries from all the commission people. In the first place, as Mr. McCormick has testified, he and I were connected with the same concerns that used a good deal of coal. The Central Pennsylvania Traction Company I was interested in, and the Central Iron & Steel Company we were interested in at that time. We were interested in flour mills at Harrisburg and we sold to them, and some of my family were interested in a street railroad at Charleston and we sold to them. In the general market we sold a good deal to the Keystone Coal & Coke Company, to James Boyd & Company, to Madiera-Hill & Company. I think to Ernest Long & Company.

I guess that is enough.

17 Q. State whether or not you were able to fill the demands for the Sonman coal in the period from 1903 to 1906, in which you were connected with the Company?

A. We never were anything like it.

Q. Why not?

A. Because we got a trifling supply of cars.

Q. Why?

A. We got an insignificant supply of cars.

Q. Railroad cars?

A. Yes sir.

Cross-examination.

By Mr. BIKLE:

Q. When you were with Mr. McCormick to see Mr. Cassatt do you remember when that was?

A. Yes, that was after the 1st of April, 1903, in either April or May I think.

Q. And what were the reasons Mr. Cassatt gave you for the neglect of the Company to give you cars at that time?

A. I don't know that he stated the reasons, but he talked about the necessity of taking care of large shippers of coal who were coaling ocean steamers in New York and supplying the public service companies in the large cities.

Q. You say he spoke of the necessity of supplying the ocean steamers at New York with coal in order they might make their journeys was one of the reasons?

A. I suppose that is what he meant.

Q. What do you mean by the necessity of supplying the public service corporations?

A. I don't know any more about what he meant than you know.

Q. Didn't he mean the necessity of supplying such companies as public lighting companies?

A. Yes sir.

18 Q. Anything else?

A. I don't know.

Q. Did he mean supplying companies that were engaged in other operations of a public nature, for instance, furnishing water supply where steam was necessary?

A. I don't remember of his referring to water supply.

Q. Wasn't it rather with respect to the necessities of the consumer that he was speaking when he spoke of the necessity of sending these cars in that direction?

A. Very likely.

Q. Did he bring to your attention at that time whether or not this condition of which you spoke was a general condition?

Mr. LIVERIGHT: What condition?

By Mr. BIKLE:

Q. The condition that he claimed to have a short supply of cars?

A. No, he certainly did not.

Q. What do you know about that, whether other coal producers than yourself *who* claimed there was a short car supply?

Mr. COLE: That is not cross-examination and is objected to.

By Mr. BIKLE:

Q. Do you know as to the situation of other shippers in regard to car supply?

Mr. LIVERIGHT: Objected to as not cross-examination.

19 By Mr. BIKLE:

Q. Do you know of the situation of other shippers of coal in the general vicinity of Cambria County and Clearfield County with respect to car supply?

Mr. LIVERIGHT: Objection renewed.

Mr. BIKLE: We will have to keep Mr. Cameron here then.

By Mr. LIVERIGHT:

Q. When Mr. Cassatt was telling you about the ways of the public service corporations and their needs did you tell him anything about what you had to supply coal with?

A. We had to supply with coal?

Q. Any public service corporations?

A. I think we did, yes.

Q. Which ones were they?

A. I don't know, I suppose we told him who we had orders from at that time. I don't remember anything of that.

Q. At that time state whether or not your Company had orders from public service corporations?

A. I would have to look at our records and see. I think we did, but I would have to look at our record.

By Mr. BIKLE:

Q. In the list you have given us there are included no such public service corporations, are there?

A. Yes, I mentioned the Traction Company.

Q. You didn't mention it?

A. I mentioned two. I mentioned The Central Pennsylvania Traction Company and the Charleston Railway Company.

Q. You say you don't remember whether you brought any of those to Mr. Cassatt's attention?

A. No, I don't remember specifically.

(Court adjourned until 9 A. M.)

Tuesday, February 20th, 1912, Court convened at 9 A. M.

20 VANCE C. McCORMICK, recalled on part of plaintiff.

By Mr. LIVERIGHT:

Q. In reference to car service and car supply subsequent to 1903, did you have interviews with any of the officials of the Railroad Company?

A. I did.

Q. With whom?

A. We had interviews with the President, Mr. Cassatt, and interviews with Mr. Atterbury, and interviews with Mr. Trump.

Q. In what did these interviews culminate finally in the fall of 1905?

A. They culminated finally in our being compelled to purchase some of our own cars.

Q. At whose suggestion was that done?

A. Well we were forced to do it, we weren't getting any cars enough to run our mine and we were compelled to purchase our own cars, and we were advised by some of the Railroad officials to do so. I don't just remember the individuals who advised us on that point. But we consulted with them of course fully before we went over the situation finally, explained our situation and then purchased these 80 cars.

Q. What kind of cars were they?

A. They were 100,000 pound capacity standard Pennsylvania steel cars.

21 Q. Were they used at your Sonman Shaft thereafter?

A. Yes, altogether at the Sonman Shaft.

Q. Beginning when?

A. They were delivered, I don't know the exact date, I would have to look that up from records to see when it first began. The fall of 1905 I think, but I would have to look that up.

Q. What was the regulation of the Pennsylvania Railroad Company as to the manner in which individual cars should be counted against distribution?

A. Our understanding was individual cars did not count against your share of P. R. R. equipment.

Q. Do you know whether there was any change in that distribution rule made shortly thereafter?

A. I think shortly after that time there was a change made.

Q. What rule was then in force?

By Mr. O'LAUGHLIN:

Q. Who are you quoting as to the rule?

A. I couldn't cite any individual, but it would be a simple thing to get from the railroad officials the exact arrangement. I couldn't exactly state it myself at that time.

By Mr. LIVERIGHT:

Q. State shortly thereafter, after your interviews with the Railroad Company and your purchase of individual cars, a change was made in the distribution rules by virtue of which there was a change in the service you obtained from the individual cars?

A. Yes, there was.

Q. Do you know how long after your purchase?

A. I don't exactly. It was several months after.

22 Q. Prior to the change in the rules what was the effect of the purchase of the cars upon the number of system cars you received from the Railroad Company?

A. I don't think I could tell you that.

Q. How long did you keep those cars?

A. We sold them a couple of years ago I think. We found when the change of rule went into effect that unless you had enough cars for your entire output, the individual cars weren't a great benefit under the present arrangement; in other words, they would force us to buy enough cars for all our shipments. Under the old system that wasn't necessary.

Q. In order to get a sufficient car supply state whether you made any other arrangements with any other operators for cars?

A. We frequently did that. We did that with the Keystone Coal & Coke Company. We would have to sell our coal at lower prices in order to get them to put their cars in. We sold below the market and we did that with Baker & Whitely. I have correspondence which shows we quoted Baker-Whitely \$1.50 on some coal and finally sold it at \$1.35. Of course they put their cars in.

Q. Did you make arrangements with any other operator?

A. We made arrangements with Berwind-White to place their cars at the mine.

Q. What was the outcome of that arrangement?

A. Of the Berwind-White arrangement? Well they placed us enough cars to mine a considerable tonnage. We sold the coal at lower prices than the market to get the cars.

Q. What was the market?

A. Do you mean what was the price?

Q. Yes?

A. I think my recollection is we sold the coal at \$1.20 to get their cars.

23 Q. Did you get their cars?

A. We always got the Berwind-White cars. When they said they would put cars in we got them.

Q. How many cars a day did that run?

A. I think we got enough cars for 500 tons a day for a time and later I think it was 750, but I would have to refresh my memory from the Berwind-White Coal Mining people.

By the COURT:

Q. When was that?

A. That was about the latter part of 1906 or 1907, I think probably 1907.

By Mr. LIVERIGHT:

Q. You say you dealt with them at \$1.20 a gross ton at the mines. What was the market price?

A. We always could have gotten, if we could have made our con-

tracts for the year at prevailing prices, at \$1.35 during those periods before the first of April, which was always our plan of operation if we could do it.

Q. How many tons did you so sell to the Berwind-White Coal Mining Company?

A. The one contract I remember was 100,000 tons.

Q. For what period did that extend?

A. I think that was a year.

Q. Then in that year are we to understand your tonnage was considerably increased over what it had been previous?

A. Our tonnage was increased, due to our getting cars through this arrangement with Mr. Berwind.

Q. At this same time were you getting Keystone cars also?

A. I don't remember that.

24 Q. Were you getting cars put in by any other operator, Pennsylvania, Beech Creek & Eastern Coal Company, for instance?

A. They placed cars, not only that time but previous to that. We had sold to the then Pennsylvania Coal & Coke and they had placed cars, as well as Keystone and Baker-Whitely. A number of concerns did that with us. They would get our coal at reduced prices.

Q. Can you state the period of this supply?

A. No. I cannot at this time.

Cross-examination.

By Mr. O'LAUGHLIN:

Q. You have spoken several times about f. o. b. So that the jury may understand just what it is and we may, I will ask you a few questions about it. As to your sidings to your tipples who owns them, you or the Railroad Company?

A. We own them.

Q. Down to the switch with the branch?

A. Yes, sir.

Q. And as to the coal which you sell standing on the siding what transpires, what are the facts, how do you go about it?

A. The coal is sold f. o. b. cars at the mines, that is, on board the cars at the mines, but it is sold by the railroad weights.

Q. Then the coal in the first place must be on the car on the siding before it is sold?

A. Before it is sold.

Q. And what you in fact sell is the car number, isn't it? Until you have a car number which has coal on it, you don't sell?

A. No, I suppose not.

Q. Outside of the contracts, if you during this time had a car of coal there, will you say so we will understand it what it is that happens between you and the man who buys it, when you sell?

25 A. Well we sell a car of coal standing at the tipples—

Q. I mean the actual things that go on between you, so that we will understand it?

A. That is before the car is sold?

Q. Yes, sir?

A. The first thing that is done, they mine the coal to get it in the car, and then we have an order for the coal and the coal shipped to the consignee.

Q. That is, you mean you have a written order and the coal is shipped then to the consignee?

A. The order comes to the office at the mine and the mine superintendent gives the shipping directions to the railroad official, the proper official, who sees that the coal is shipped to the proper party.

Q. What does he do with the proper party?

A. The proper party, if he has got the money, pays for the coal.

Q. What does the mine man do who tells the railroad company about it, what does he do with the consignee?

A. You mean the details of the shipping arrangement?

Q. Yes?

A. I would have to ask you to let the men out at the mines give you the details of the shipping. I am not a mine man and am not familiar with the bills of lading and all the paraphernalia. I was in the Harrisburg office.

Q. What did you do in the Harrisburg office when you sold the car of coal?

A. We would notify the mine, send a copy of the order right to the mine. Mr. Anvers would take the order from me and send it out to the mine.

Q. If you got a telephone or a letter inquiring for a car of coal and quoting a price you would take, you would answer that man and say whether or not you would give it to him?

26 man and say whether or not you would give it to him?

A. Yes sir.

Q. Then if you did give it to him, you would send an order to the mine to ship it to him?

A. Yes sir.

Q. The next thing that would happen, when it was on the car it was shipped to him and the railroad told, as you said, to manifest it?

A. Yes sir.

Q. On any of these orders that you have spoken of did you folks have the freight to pay?

A. I don't think any of those contracts that I have spoken of that we had. On our Charleston contracts we paid the vessel. No, we didn't pay the vessel charge. No, I don't think we paid the freight on any of them. I think they were all sold f. o. b. cars at the mines.

— If from the time you started it going until it reached the consignee it would become destroyed, what happened as between the consignor and the consignee?

Mr. LIVERIGHT: We object to that as not cross-examination.

A. I presume we put a claim in for the damage that had been incurred.

By Mr. COLE:

Q. Wouldn't the man who owned this coal put the claim in?

A. The man who owned the coal?

Q. Yes, the man you sold it to?

A. I presume so.

By Mr. O'LAUGHLIN:

Q. You have heard the discussion as to the rules and custom that are said to and said not to obtain in the coal business. Is it or is it not a custom in the coal business for the consignor to make good a car of coal which is lost in transit or taken in transit by some one else before it reaches the consignee and which was sold to the consignee at a price f. o. b. the mines?

Mr. COLE: We object to that as irrelevant incompetent and immaterial, and further as not cross-examination. It has no bearing upon the matter in controversy here.

The COURT: I think we will hear the testimony, note an exception for plaintiff and seal bill.

A. There must be some regulation for a matter of that sort. I don't remember in our experience of having any claims or any difficulties of that kind.

By Mr. COLE:

Q. Do you know any custom that prevails in the matter?

A. There must be some custom.

Q. The question is, do you know of it?

A. I couldn't swear as to the exact method of placing a claim or how it was done, because I don't remember of having done it, but there must be some custom or regulation with the railroad and shipper.

Q. That isn't the question whether there is or not the question is whether you know it?

A. I am not familiar with the details, but there is a regulation of some sort.

By Mr. O'LAUGHLIN:

Q. Do you or do you not yourself know the regulation you speak of?

A. I do not, Mr. O'Laughlin.

Q. At the Sonman mine, during the term of this suit, from April 1, 1903, to April 1, 1908, did or did not the Company have a lost car of coal or a car which did not reach the consignee and which was sold the consignee f. o. b. the mines?

Mr. COLE: That is immaterial, irrelevant and not cross-examination.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. If coal shipped by your Company to a consignee should not be delivered to the consignee and if it were sold f. o. b. the mines to the consignee, would or would it not under the rule and custom

of your Company be billed to the consignee and a collection for it endeavored to be made from the consignee?

Mr. COLE: That is objected to as incompetent, irrelevant and immaterial. It is not offered to prove a custom that changes the meaning of the term f. o. b. cars in law and it is not competent to prove a contract. It is purely an academic question and is based upon a hypothesis, the facts of which are not proven.

The COURT: We will sustain the objection, exclude the testimony, note exception for defendant and seal a bill.

By Mr. O'LAUGHLIN:

Q. In your testimony in chief you quoted a price at \$1.75 f. o. b. the mines. What do you mean as to that having been offered; you quote it as having been offered you by the purchaser from you?

A. Well they offered to buy the coal at \$1.75 a gross ton on cars at the mines. F. o. b. cars at the mines.

Q. What do you mean f. o. b. cars at the mines?

A. I mean the coal loaded on the car at the mine.

29 Q. In one of these letters, which you identify as having been sent by you to Mr. Trump, February 29th, 1904, being Exhibit No. 11, you make reference to a special order. What is that, Mr. McCormick?

A. I don't know that I remember, Mr. O'Laughlin, that special order. That special order was simply this—

Q. Only define the general term?

A. We had this contract for the Charleston Consolidated Light, Heat and Power Company, of Charleston, South Carolina. All that coal had to be shipped by schooner from Philadelphia and those schooners hauled anywhere from 750 to 1,000 tons. They could not remain at the Philadelphia piers for a longer time than probably a week, and frequently we would charter schooners and wouldn't get enough cars to fill them and we would lose the schooner and have to pay charges for them if they held over a day, and we would often ask for a special order from the Railroad for enough cars to load the schooner so we could keep the companies in light and keep the trolley running. If you notice in the correspondence that happened a number of times and I think that is what that special order referred to at that time.

Q. What was it you wanted Mr. Trump to understand from your request when you mention special orders?

A. We wanted him to understand that unless we got 20 cars at that time immediately, we were only getting, as I remember it, at that time 3 or 4 a day or 6 or 7 a day, I don't remember the exact figures, we could not possibly have loaded that schooner, and we just begged him for a special order for 20 cars to keep those people in coal to give the City of Charleston light and power to run their traction company.

Q. Did you or did you not get the cars you asked Mr. Trump about?

A. I don't remember at that particular time, we may have.

30 I would have to go back over the daily car sheets to see. We frequently did when we would tell him we had a schooner and we were getting no cars and they took pity on us and mercy on us and handed us out 20 cars at one time. We would go to see them and tell the railroad officials and after our plea and giving them a pitiful story and outrageous treatment, we sometimes got those 20 cars, but it never lasted and our average running there, the years as I told you, about 8 cars one year and before that an average of 6 or 7.

Mr. BIKLE: I must again ask that latter part be stricken out, because the witness knows the eight cars were from April 1st, 1903, as he testified.

Q. That is true?

A. Yes sir, that is true.

The COURT: You want the prior to that? Let that be stricken out.

By Mr. O'LAUGHLIN:

Q. In Exhibit No. 17, Mr. McCormick, there were 50 tons of coal ordered of your Company and another exhibit following it, which is the answer apparently, the order is cancelled. Both these are in October, of 1905. Did or did not the Railroad Company furnish you with cars for the shipment of that?

A. They did not.

Q. Furnished none?

A. I don't remember whether they furnished any. We gave them exactly the pro rata of their order and you see they got two tons I think according to our letter. I remember Mr. Cameron told them to send a wheelbarrow for their share of the coal. We were to get cars for it. That was after one of our visits to the other officials. They were going to give us a Company order and that was the Company order they were going to give us to help us out.

31 Q. This was 50 cars?

A. It was 50 net tons a week I think of blacksmith coal.

Q. In reaching the prices you obtained at your mine during the time of this action you had a statement which Counsel threatened to look at last night to try and avoid wasting time, but I guess we were all too busy. Have you those arranged in any way so we can get at it without spending a great deal of time?

A. What papers?

Q. The letters we examined, three or four altogether yesterday?

Mr. LIVERIGHT: They are separated out and we will submit them to you at noon.

By Mr. O'LAUGHLIN:

Q. As to these people who asked you for coal and whose letters you have here, are they all consumers?

A. No.

Q. Specifically now Madierra-Hill & Company you referred to in your examination in chief, are they consumers or brokers?

A. No, they are brokers, dealers.

Q. The Boyd Company?

A. They are dealers.

Q. Newton & Company?

A. Dealers.

Q. Baker-Whitely Company?

A. Dealers.

Q. They are located in Baltimore, Maryland?

A. Yes.

Q. The Traction Company was a consumer?

A. Consumer.

Q. At Harrisburg?

A. Yes sir.

32 Q. Did or did they not get the coal notwithstanding you were unable to supply it?

Mr. COLE: What has that got to do with it. It is immaterial and irrelevant and we object to it.

The COURT: Objection sustained, evidence excluded, exception noted for defendant and bill sealed.

By Mr. O'LAUGHLIN:

Q. Did Newton & Company inquire of you for bituminous coal?

A. They did. It was Madera-Hill & Company, and then they changed to Newton & Company, and now they are back again to Madera-Hill & Company. Newton & Company used to be the hard coal end I think, but they combined.

Q. Did you have to refuse to sell to Madera-Hill some of the coal they inquired about, to George B. Newton & Company?

A. Yes, Mr. Percy Madera is a stockholder in our Company, a small stockholder.

Q. Did you also have to refuse the Boyd Company in Harrisburg?

A. Yes. Well we made the contract with them, which we could not supply coal on and after that time they didn't want to touch us.

Q. Well did these dealers you speak of get their coal then from Berwind-White?

A. Why I have no doubt every dealer we have mentioned there has at some time or other bought coal from Berwind-White. I don't know, of course, who they buy coal from. I have never had access to their records. Some of them were miners themselves and had their own mines.

33 By Mr. COLE:

Q. Neither Madera-Hill or any of the rest of these people went out of business because they couldn't get coal?

A. They are all in business today I think.

Q. They all get coal?

A. James Boyd & Company are not selling coal today. The rest I believe are.

By Mr. O'LAUGHLIN:

Q. Do you, as to the orders you spoke of as having received, know as to any of them before you received them or after where inquiries were made?

A. I don't know that. It may have been, I don't know.

Q. Do you know from any of the consumers who have made these inquiries of you didn't get the coal they wanted, the volumes of coal they wanted for their purposes?

A. No, I don't know of any of them. A number of consumers, in which we were interested, had to buy coal from other people and at higher prices than they had contracted with us.

Q. On the market is your coal, the Sonman or Miller coal, a higher price than the Moshannon or "D"?

A. The best Moshannon coal I would say it was about the same price. There is not much of that left. We were never bothered much in competition with the Moshannon. We were up against the Georges Creek. It was the same grade as Georges Creek and coal of that grade, the best coal in the market.

Q. Your prices you would get in the market would run about the same grade as Moshannon coal in this region?

A. I am not familiar enough with the Moshannon prices to say. The Sonman coal is a different thing from the Miller coal.
34 There are some Miller coals that are not as good grades, run anywhere from 10 to 20 or 25 cents lower price than the Sonman coal, which is the Wilmore coal, the Wilmore basin coal about South Fork, Portage and Sonman. The Henrietta Coal Company and Columbia Coal Mining Company is our grade.

Q. The Sonman was it steam coal or blacksmith?

A. It is both. It is a very high grade steam coal and smithing coal. We could have shipped a very great deal of it West, if we could get cars. We did ship to Chicago for smithing purposes.

Q. The prices obtained for smithing purposes is greater than for steam purposes?

A. To everyone but the Railroad Company. It net us \$1.35 net, is what \$1.45 gross, that is the price we got from the Railroad Company at that time. On carload lots for smithing purposes West we got higher prices.

Q. The trade smithing price is higher than the trade steam coal?

A. For the quantity we sold we could get better prices than for steam purposes. That was in the West. I don't remember selling smithing coal East at all. We did very little business in that, because we couldn't get enough cars to make it worth while.

Q. Did the Sonman coal for smithing purposes require a different preparation than it did for steam purposes?

A. No, I think we always shipped run of mine. I think in those days we never had but one tippie and we had to ship it all run of mine.

Q. In your vein of coal was there any impurities that had to be extracted before it was marketed?

A. No, we had no preparation at all. We just ran the raw coal from the mine on to the railroad car.

Q. Slack and all?

A. Yes, everything. We had no grades. All one grade. Run of mine coal.

35 Q. Where did you buy the 80 steel cars?

A. I think from the Pressed Steel Car Company. They were bought through a second party. They already had been purchased by someone and we took his contract off his hands. Colonel Coryell I think it was.

Q. Were they new cars?

A. New steel cars. They came right from the shops to us.

Q. They had been bought under contract by Colonel Coryell before that?

A. I think so. I think though we dealt direct with the Steel Company, but I think the order was turned over to us. I think we dealt direct with the Pressed Steel Car Company.

Q. In what year was it you bought them—1905?

A. I think in the fall of 1905.

Q. In what year did you sell them?

A. I don't remember that. We sold them I think about a couple of years ago, but I am not positive of that.

Q. Since 1908?

A. Yes, I am almost sure it was since 1908.

Q. Did you sell them in bulk, sell the 80 to some one else?

A. We sold the 80 to some one else in bulk.

By Mr. COLE:

Q. They were actually sold in 1909?

A. 1909? Well, I didn't remember the exact date.

By Mr. O'LAUGHLIN:

Q. What was the highest output of the mine in a month, physical output?

Mr. LIVERIGHT: During what period?

36 Mr. O'LAUGHLIN: Since the mine started, to start with.

Mr. COLE: That is objected to.

By Mr. O'LAUGHLIN:

Q. 1903, April 1?

A. You mean up to date?

Q. No, during the term of this action?

A. I don't know whether I can answer that accurately without going over our tonnage statements.

Q. Can you give it to us in round numbers?

A. Well I remember one month of 10,000 tons, which was about the first part of this period, which was one of the good months of cars for us. I don't remember the other figures. I think we probably exceeded that up to 1907, although I would have to refresh my memory.

Q. During the month the Berwinds were giving you 500 tons a day in cars didn't you exceed that?

A. Yes, I think we did run up when we were getting a stated supply of cars. We must have exceeded that.

Q. During the months the Berwinds and Keystone were giving you some didn't you go about 10,000 tons?

A. We must have exceeded that. That was in the early part of the season and I think we probably did. We could have done it, no question about that, if we had a stated supply of cars.

Q. Did they not give you a stated supply of cars, as you said they did?

A. Yes, when Berwind was giving us cars we must have had a good run, for their tonnage alone was considerable that we were placing in their cars.

Q. In what year was that—the first year of this term?

A. The Berwind cars?

Q. Yes?

A. No, that was the latter end of it. It must have been about 1907 I think.

37 Q. Did you during 1907 only have the Berwind order?

A. With their cars I think it was. It was 1906 or 1907. It was the latter part of this period of this suit.

Q. About one year of it you say?

A. I should say so.

Q. Was the Keystone order the same year?

A. I don't remember the exact time the Keystone cars were placed there. They were placed there at different periods, as I remember, all during the period.

Q. At different times there were some Keystones put in during any year of the period, is that it?

A. Every once in a while we couldn't ship coal on their contracts and we would beg them for cars and say we will give it to you for this price if you put the cars in. We did that for Baker-Whitely one period and they put cars in. Whenever we could get cars we sacrificed the price to keep the men there to keep the mine going. We couldn't keep the men there and the kind we could keep weren't the kind we wanted, because the good men went to the mines where they could get work.

Q. Did you have all your coal sold for the Sonman Company in the city selling agency, your own or other?

A. We didn't have a city selling agency at that time. I sold all the coal from Harrisburg. That was organized at a period I think after the period of this suit.

Q. Did you or did you not get anything for the selling end of it?

A. No, we sold it direct.

Q. Yours was a salary?

A. I didn't get a salary. Originally Mr. Cameron, Mr. Saxman and myself were the principal owners and since that time Mr. Neale and Mr. Thorn became interested in place of these gentlemen, and we never got any salary for our work. We did the work gratis.

38 Q. Were there many of these Baker-Whitely orders for which they supplied cars?

A. I have the record of the one that I remember distinctly and I don't remember the others specifically. I can't mention them, but I have the contracts with me in which we sold them the coal at \$1.35 in their cars, but Mr. Whitely and myself talked frequently over the telephone and a great many of the orders of that kind were arranged over the phone and placing of the cars.

Q. Did they in connection with these sales send you the shipping directions, or did you send it to them, send the coal to them somewhere?

A. I don't remember how the coal was billed. They would I think send us the shipping directions, I am not sure about that. They did both things. The coal brokers would do both ways.

Q. The Berwind-White order finally got up to 750 tons a day?

A. I think it did. I think that was the figure.

Q. Was that the top notch of their supply of cars to you?

A. I don't remember about that. I remember we would often give them special lots of coal in addition to the contract, provided we had transportation for them. Some periods in the summer months that every coal man knows that for a week or so there is often a flat soft spot in the coal market, which always occurs every year, and we did that with our customers, sometimes increase our tonnage over the contract.

Q. Were the Pennsylvania Coal & Coke Company cars furnished to you?

A. Yes, we took orders for the Keystone Coal & Coke Company and the Pennsylvania Coal & Coke Company and I think they both at that time were selling their coal to the Interurban Rapid Transit of New York. We couldn't bid on it because we couldn't
39 guarantee any shipments. We had to turn down business of that sort. So these middlemen took it and their coal was perfectly satisfactory and they were very anxious to get our coal for that contract because they had to have a high grade coal and, as I recollect it, they put in some of their cars to help fill out that order, but I couldn't tell the exact time. They may have been Webster cars. I know the coal was sold as Webster coal.

Q. That is all they supplied, and you supplied on others?

A. I think they sold as Webster coal. I think so.

Q. The orders you spoke of, Mr. McCormick, do you know of similar ones to any other company at the time those were given you you referred to here and on which you have established the prices mentioned on your memorandum?

A. The Central Iron & Steel Company I know had some orders with Berwind-White at the same time.

Q. That is, the order which was given you and unfilled was given somebody else or maybe several somebody elses that filled it?

A. No, we were shipping coal to them at the same time that Berwind was shipping to them.

Q. You each had an exclusive order?

A. We each had an order. Mr. Bailey explained that to us at a meeting at the time they inquired of us. They were sure of taking coal from Berwind and they had to take it as an insurance firm.

That we heard frequently in the trade that we sold the coal, they asked us frequently whether we could deliver the coal and we had to be honest and many times lost an opportunity to sell coal at good prices.

Q. As a matter of fact aren't these letters of inquiry?

A. No, these were actual contracts, the ones I referred to yesterday. We shipped all the coal we received on those contracts pro rata. We had that experience in 1902. It was very fortunate we did that, because people whom we sold coal to had resold it three times through different agencies, and the letter states came back like tumbling blocks and finally got to the man we sold to and he was stuck \$25,000, because we hadn't supplied him the coal, because we couldn't get the cars to supply it.

Q. That was before this action started at all?

A. Yes, but it taught us a lesson to deal out our coal pro rata, for we didn't want to discriminate against any of our customers, so we always made that a fixed rule to divide up the cars we got among the consumers.

Q. In addition to those you designate as consumers you had other inquiries about your coal and prices?

A. Oh! yes, we had many inquiries about our coal.

Q. Were they written or were they telephone?

A. There were lots of them written. A great many of them written. I have letters here. A great many telephone. I know all the coal men in Philadelphia and I was down there and would see them and they would talk prices and talk about contracts. I dropped into their offices. I always did that when I was in Philadelphia to keep in touch with the market. At that time we had many verbal conversations in regard to contracts for coal and I would frequently have to turn them down, I couldn't do it.

Q. Do you deal with all of those in making your expression in the way of inquiries and orders as orders?

A. No, not those inquiries. Of course, I had to tell them there was no use in our discussing making a contract, because these people wanted the coal. They could have used the coal. For instance a man would say he would take our entire output at \$1.35, provided we could assure him of a certain number of cars to make it worth his while to go around and sell the coal and have it delivered.

Q. In fact if all of the shippers could have answered yes to some inquiries made to you, would your orders have been that high?

41 A. What do you mean?

Q. If the shippers, the men who took the coal out or who sold the coal that was taken out could have guaranteed, as you speak of, all the inquiries or orders they might have received, would there have been as many?

A. As many orders?

Q. Yes?

A. I don't mean it in the sense of guaranteeing the entire 40 cars a day, which was our capacity, but a reasonable supply of cars.

Q. Now if you could have guaranteed and had a reasonable sup-

ply of cars, nobody else would have got the order for that coal obviously. Isn't that correct?

A. A great many shippers of coal would have waited until our orders were placed, because we had the best grade of coal and it was always taken up. There is not more than half a dozen shippers of our grade of coal, and the consumer wanted to get our coal first and he was willing to contract for it by the year and he was willing to pay a little better price for it, providing he was sure of getting his fuel. It wasn't a speculative coal we wanted to dump into the market at a boom period, it was our price of contract coal for the year, and that is the reason we went into it. That coal was always, as any coal man can tell you, taken up and sold.

Q. Any order which you got and accepted and filled that ended that order as far as any other shipper was concerned, didn't it?

A. I should think so, if it was consigned to a particular place.

Q. If another shipper got an order and shipped the coal, that ended that one, didn't it?

A. A particular place, yes, to a particular consumer. Of course, lots of consumers bought coal from different men. If they wanted 100,000 tons, they might buy 20,000 from five different persons.

That is possible.

42 Q. When the consumer got the 100,000 tons the order business was ended?

A. Yes, for that particular order.

Q. If that represented all the consumption from the region here in Pennsylvania, that ended the sale?

A. Yes sir.

Q. If two men were shipping coal and the one filled the orders, the other had no orders because the consumer was supplied?

A. There was never a question in the coal market about there being a demand for this particular grade of coal because there was so little of it. That affected the cheaper grade of coal.

Q. If there were two of you and you supplied it, the other man was without orders for that consumer?

A. With that particular consumer. There are plenty other consumers.

By Mr. BIKLE:

Q. If every operator dealing in the same coal that you were operating had been able to assure these middlemen or the consumers of full and regular deliveries under the contracts which might have been made, would the prices have been as good as they were?

A. Mr. Bikle, that is just what we went into this mine with that object.

Q. Now just wait?

A. I am going to answer your question. That is just exactly the condition we wanted. We wanted to get all the cars we could get, we were satisfied with low prices, but we were going to make our money on a big tonnage, because we had the best grade of coal in Pennsylvania. The fellows that would have suffered under your theory, because you gave all the consumers plenty of cars and all the

coal they needed the price of coal is going down, is to my mind the wrong theory for the Railroad Company to work on.

43 Q. In the first of all, when you say that you have excluded the Clearfield coal?

A. There is so little of the Moshannon left here.

Q. Let us consider the coal you were mining and the operators who were mining that same coal. Now assuming that all those operators would have made guarantees of complete deliveries under such contracts as were offered to you, you admit there are other people mining your grade of coal?

A. How many I ask you?

Q. One half dozen you say?

A. Yes sir.

Q. Do you think the price would have been what it was?

Mr. LIVERIGHT: We object to the question, for the reason it is based on assumed facts not in the proofs at all, about orders to the other operators and supply of cars they had and various other facts that are hypothetical.

A. Let me answer it. Most of the other operators mining this kind of coal were getting not all the cars they needed but a great deal more cars than we got and we heard from our customers, they say there is so and so.

By Mr. BIKLE:

Q. As you just now stated, they weren't getting all they wanted. These other operators, you say, they had a shortage, too. Now I want to assume simply that every operator of your grade of coal bring it down to your own basis, could have guaranteed full deliveries through the year, don't you know that would have brought the price down?

A. No, not enough of it to affect the market. I don't think there is enough, because Berwind, who is one of the big shippers of that kind of coal, was getting nearly his entire supply and he was the biggest shipper of that kind of coal.

44 Q. Wasn't the prices held up for that coal because there was a shortage?

A. No, our coal wouldn't have affected the general market conditions of coal, because there is not enough on the market.

Q. Do you mean to say that if these other operators, six other operators, had produced their full output and you had produced your full output and Berwind had produced his full output, there wouldn't have been a great many more tons of that coal go on the market?

A. It would have been absorbed.

Q. But there would have been a great deal many more tons of coal go on the market?

A. Certainly.

Q. And you mean to say those thousands of additional tons of coal would all have commanded in your best judgment the same price?

A. I think if you get the Columbia Coal Mining Company's books and the Logan——

Q. No just wait?

A. Now these are the six shippers.

Q. I want to know whether in your best judgment all those thousands of tons of coal wouldn't have affected the price?

A. No sir, I don't think so. The reason is simply this. Out of eight to ten millions of coal say shipped on this road, if that is the tonnage, the amount of coal that is shipped by these six, say that number, I don't know exactly about the half dozen, would not affect the general market conditions, because the tonnage they ship and which is a special coal and which is taken up by the same people year after year, who know it and have contracts from the first of April to the next first of April at fair prices, that wouldn't affect the general market. The biggest shipper of that coal is the Berwind-

45 White Coal Mining Company and they got their cars during this period. There you eliminate the biggest tonnage of the six and leave the other five smallest shippers.

Q. If that does not affect the price of coal, how do you explain the contract price of coal, as testified by you, fell from \$1.75 for the year April 1st, 1903, to about \$1.35 for the year beginning April 1st, 1904. Why was that?

A. Well at a great period of shortage then the price of this particular coal jumped away up. During the strike it went up to \$5 or \$6 a ton, during the latter part of 1902. It was up to \$1.85 or \$2 a ton, but my theory is this coal should be sold at contract prices. The price of contract coal did not go down during those periods. I don't believe the price of this coal that Columbia and Henrietta shipped on their contracts dropped below \$1.35 in any of those years.

Q. I asked you to explain why the price fell from \$1.75 for the year beginning April 1st, 1903, to \$1.35 for the year 1904. Wasn't it because the car shortage wasn't as bad as it had been?

A. Naturally the price from \$1.75 dropped from a strike period of 1902, which was abnormal. It was perfectly natural when the Railroad Company had an adequate supply in 1904 and 1905 the price wouldn't be \$2.00.

Q. Isn't this true. That if mines selling other grades of coal than yours, even lower grades, reduce the price, your price necessarily falls somewhat, because consumers will not pay \$1.75 for your coal, if coal of a lower grade is selling say for \$1.00 a ton?

A. That is true. For instance, ourselves we had to sell coal at prices below \$1.35 during the summer months. We had spot coal we couldn't contract for before the first of April, which was the period when all these contracts are renewed from year to year and we had extra coal to sell because on account of the flood or other reasons we were not able to contract it. When we had to go out in the

46 summer months in competition with cheap coals it naturally affected a small amount of this tonnage, but that is not the way this coal should be sold.

Q. But, as I understand you to say, the usual differential between your coal and the other coals you regard as inferior is about 25 cents a ton?

A. Yes sir.

Q. So that the decrease in the price of the other coal reflects itself on your prices?

A. Not on contract coal.

Q. Would it affect it for the next year?

A. Spot coal sold during the soft months it would naturally affect it.

Q. Turning to the question previously put, suppose there were such a car supply that any operator could guarantee any amount of deliveries and could assure his customers an absolute delivery in accordance with those contracts, wouldn't that decrease the price of coal generally.

Mr. COLE: I think we have gone far enough in this theory. We have got all the facts. This is a theory not relative to this case and we object to it on that ground.

Mr. BIKLE: The purpose of the offer is to show that had the conditions existed which this witness claims could have existed, to wit, had the Railroad Company been in a position to give to every operator all the coal cars that under any circumstances he would demand, the price of coal would have been much less than it actually was. For the purpose of showing that these prices are intimately bound up and connected with the car shortage and that therefore damages based on the theory of an absolute complete supply cannot be measured by the prices prevailing at the time of the car shortage.

Mr. LIVERIGHT: Objected to further for the reason it is an attempt to interject the defense into the cross-examination of the witness, and for the further reason that the questions are argumentative and manifestly offered on the part of the Counsel to hold a debate with the witness.

The COURT: We will hear the answer and note an exception for plaintiff and seal a bill.

A. If all the operators you mean had all the cars they wanted to ship coal to their customers?

By Mr. BIKLE:

Q. That is, if the price of coal was determined absolutely on the question of supply and demand without reference to supply of cars?

A. Yes, that might automatically affect the supply of coal naturally, but the policy of a railroad company adopting that policy of curtailing car supply to keep up prices of coal and affects the general business of the community and State, that is, it is artificial and that thing is not a proper economic law and it works out to the detriment of the business and ultimately to the detriment of the coal man, and our theory is we would rather have that condition and have had from 1899, when we started, because we would be in better condition today, after 12 or 13 years, than going through this condition of cars which was artificial.

Q. I don't want to argue that?

A. That has all to be taken into consideration.

Q. If that condition is artificial, as you say, and the price is an equally artificial price, that is true?

A. Well it is the market price today that is what the price is. The price is a fact. The question of making cars short is artificial. The price is what you are up against.

Q. And the car shortage enters into your price, that is one of the determining elements?

A. The railroad worked on that theory.

Q. The railroad doesn't do it for that purpose, as you know?

A. I don't know it doesn't do it for that purpose. I believe that to be a fact. I positively state that. I have argued that question with too many railroad officials.

48 JAMES STRAN called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. How many empties could be placed above the tipple, to be dropped under the tipple for loading purposes?

A. 53 steels one time.

Q. How many empties could stand below the tipple, between there and the railroad proper?

A. Loaded you mean?

Q. Yes?

A. 53.

Q. 53 on each side of the tipple?

A. Yes sir, that is counting steels.

Q. Would that mean more of other cars?

A. Yes sir, according to the length of the cars. Sometimes less.

Q. Was that the condition as far back as 1903?

A. Yes sir.

Q. At that time did you produce as much as 1,100 tons per day in 1903?

A. No sir.

Q. Why not?

A. We couldn't get the cars to put it in.

Q. Could you get the men?

A. Could we have?

Q. Yes?

A. We have never had any trouble when the mine was running to get them. I presume we could at that time.

Q. How was the car supply in general?

A. Rotten.

Q. As superintendent have you made any effort to improve it?

A. Improve the car supply?

Q. Yes, get more cars?

49 A. Well we have come in under the Interstate Commerce there since the different rate sheet and different system in later years. We do kick about cars, call Altoona and kick right along for cars.

Q. I mean up to April, 1908, as superintendent did you order cars?

A. Yes sir, through my office.

Q. From whom?

A. From Mr. Steele's office in Altoona.

Q. Do you know what requisitions were put in, that is, for how many cars a day?

A. I couldn't tell you off hand just what it is. We can go back to the records and find out.

Q. What effect did this car supply have upon your organization, the contentedness of your men and the willingness to stay at your plant?

A. You are coming back to 1903 period?

Q. For the whole period?

A. It was very bad. We couldn't maintain any organization at all.

Q. Why not?

A. We couldn't give the men work, consequently we couldn't keep them.

Q. What became of them?

A. I don't know. They didn't stay with us. I never kept track of them.

Q. Was this condition of car supply just occasioned or how long did it obtain; what part of the period did it cover?

A. The worst part of the car supply was up until 1906.

Q. Did you get cars every day?

A. No sir.

Q. Would there be more than one day or would there be two or three days in succession in which no cars were received?

A. I have sat with my feet on the desk for two weeks.

Q. Waiting for what?

A. For cars.

Q. State what the effect of an irregular car supply and a short output has upon the cost of each ton of coal produced?

A. Well it increases your fixed expenses, such as salaries and maintenance of the plant, such as pumping of water and feeding of mules. Your foreman's salary. Your office force.

* * * * *

50 JAMES B. NEALE called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. What connection have you had with the Sonman Shaft Coal Company?

A. My partner and I bought Mr. Saxman's interest in the Company in January, 1905, and I went there at that time as the general manager, I guess. I was the member of the Company in charge of the operation.

Q. Have you been back and forward to Sonman frequently since that date?

A. Yes sir.

Q. How often do you go there?

A. Well I go at various periods and I presume that during the time I have averaged a trip there about once a month. I used to go over more frequently than I do now.

Q. Do you go inside of the mine?

A. Yes sir.

Q. Were you familiar with the inside, as well as the outside, in 1905, 1903 and 1907?

A. I was, yes sir.

Q. What were the condition at that time as to car supply?

A. The car supply was wretched, miserable.

Q. What proportion of the time did you run?

A. I couldn't give you figures as to the proportion of the time we ran, but I know we ran very broken time. Our car supply was so wretched that it was impossible to make the mine operate profitably. It was impossible to keep any kind of organization there. The whole thing was in wretched shape there.

Q. What is the effect on cost of producing a ton of coal or irregularity in car supply, irregularity in employment of men, both miners and company men?

51 A. It affects the cost of coal very seriously and I think possibly, especially in our countryside there at Sonman one of the items it affects is the question of cutting down the bottom. In other words, if the coal is not mined quickly out of a section you are mining, the weight of the superimposed structure keeps cutting on the bottom and you have got to cut away at very considerable expense, and if we had a full car supply and have been able to run it day by day we would have been able to pull the pillars back and the whole thing would be done and no expense of maintaining it. In addition we have a constant expense of continual pumping and feeding mules and things of that kind that go on day in and day out. In addition to that, a short car supply means the man who is a good workman won't stay there, he will go some place he can get steady work. It decreases the efficiency of your working force. We have at Sonman and at all pits a certain number of good men, but I think a large number of good men had been driven out of that section of the country by the general shortage.

* * * * *

52 Cross-examination.

* * * * *

By Mr. LIVERIGHT:

Q. What is the effect on being able to make long term contracts and on the price of coal at the time you try to dispose of it, not being able to guarantee regular deliveries?

Mr. O'LAUGHLIN: We object to the question to this witness as being incompetent, irrelevant and immaterial, the witness not having shown that he knows the facts or has a knowledge upon which might be based any testimony with regard to the prices.

Mr. LIVERIGHT: We will further qualify him.

Q. Are you engaged in the selling end of the coal business?

A. Not actively, no. I am interested as a partner in Carr, Miller & Company, Philadelphia.

Q. Are they selling agents?

A. They are.

Q. Do they handle the coal?

A. They handle the Sonman production.

Q. And you are a partner in that firm?

A. Yes sir.

The COURT: I think the witness is competent. Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

A. It materially lessens the amount you can get for your coal, if you can't be reasonably sure of delivery of it.

53 J. A. JARDINE called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. What do you say was the condition of the market as to the demand for bituminous coal in the years from April 1st, 1903 to April 1st, 1907, was it normal or abnormal?

A. There was nothing abnormal about the business during any of that time. We were actively engaged in buying and selling coal, besides mining coal, so I am well acquainted with the conditions.

54 JOHN W. ROCKWELL called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. In the period I have mentioned, 1903 to 1907, what do you say was the condition of the market for demand for coal, was it normal or otherwise?

A. It was normal.

* * * * *

55 JAMES VAN PELT called on part of plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. What was the condition of the market in relation to the demand for coal in the period from 1903 to 1907, that is to say, was it normal or otherwise?

A. I considered it to be about normal.

56 FRANK H. PALMER called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Twin Branch, West Virginia.

Q. What is your business?

A. General Manager for the J. B. B. Coal Company.

Q. How long have you been in the coal business?

A. Well I have had about fourteen years' experience as a mining

engineer and about eleven years as superintendent and general manager in direct charge of the operation.

Q. A large operation; any large operation?

A. Well at present we have an operation that produces about 65,000 tons a month.

Q. A month?

A. Yes sir.

Q. Were you at any time connected with the Sonman Shaft Coal Company, at Sonman Station, Pennsylvania, on the Pennsylvania Railroad?

A. Yes sir.

Q. When?

A. Well in 1902 I was their mining engineer and from February 1903, until October 1904 I was superintendent in charge of the mine.

Q. Where were you stationed?

A. At Sonman. It was during the time I was superintendent.

Q. What was the state of the car supply during your superintendency?

A. Well it was very poor and I would judge probably about 33 per cent. of the time the mine was in operation during the time I was there.

Q. Was there any other reason except car supply that caused the mine to lie idle two thirds of the time?

57 A. No, not any reason, except when the mine drowned out for that short period.

Q. That is at the end of the period?

A. Yes sir.

Q. Prior to that was there any reason, apart from the car supply, for the mine being idle two thirds of the time?

A. No.

Q. State whether it happened occasionally that more than one day passed without any cars being received?

A. There was a great many times there would be a week at a time we wouldn't receive any, or possibly one or two, nothing sufficient to make us start the mine.

Q. Is it a fact that with a short supply it is an economic mistake to operate the mine for a particular day?

A. No, we had a fixed charge there we had to pay whether the mine was in operation or not.

Q. Would there be days you would receive a few cars but not enough to warrant starting?

A. Yes, at times.

Q. Did you make any effort to improve the supply?

A. Yes, I made quite a few visits to Altoona.

Q. To whom?

A. Mr. Clark generally, and sometimes he wouldn't be there and his assistant, I just don't remember his name.

Q. Did you order cars while you were there, put in requisitions to the Railroad Company?

A. Every day over the phone.

Q. To whom would you make requisition?

A. We would just call up Mr. Clark's office.

Q. Who was Mr. Clark?

A. He was a car distributor.

Q. At Altoona?

A. Yes sir.

Q. Was that the point from which distribution was made for Sonman mine?

A. Yes sir.

* * * * *

58 M. TRUMP called on part of Plaintiff, being duly sworn and examined, testified as follows:

* * * * *

Q. I show you papers marked Plaintiff's Exhibits from No. 21 to 30 inclusive and I ask you what they are in a general way; whether they are orders for the distribution of cars or what they are?

A. They are orders for the distribution of cars.

By Mr. O'LAUGHLIN:

Q. That is, they are copies, aren't they, of something?

A. They are copies.

59 By Mr. COLE:

Q. Where are the originals?

A. The originals are with the Interstate Commerce Commission.

Q. They were offered in evidence and left there, were they, at a hearing?

A. Yes sir.

Q. Who was G. W. Creighton?

A. General Superintendent at Altoona.

Q. What had he to do with the management of the road in the distribution of cars?

A. He was the General Superintendent, acting for the General Manager on the main line between Philadelphia and Pittsburg and branches.

Q. What does R. M. P. signify when signed to a telegram?

A. R. M. Patterson, Superintendent of Freight Transportation.

Q. In 1903, in July 1903, where was Mr. Patterson located and what was his business?

A. Superintendent of Freight Transportation at Philadelphia.

We offer these Exhibits from Nos. 21 to 30 inclusive.

Mr. O'LAUGHLIN: They are objected to because they are incompetent, irrelevant and immaterial. Further for the reason that they are not what they purport to be, telegrams from any person to any person else. For the second reason they are labelled as copies. This witness has not testified they are copies of anything and are not testified to be copied by him from any paper sent by him to anybody; not copied by him, for him or in his presence.

By Mr. COLE:

Q. Where did you get these papers?

A. Mr. Patterson's office.

60 Q. That is he is now General Superintendent of Freight Transportation?

A. No, he is still Superintendent of Freight Transportation.

Q. Is his office in the Railroad building, the railroad offices?

A. Yes sir.

Q. I believe you did state they are copies of the original telegrams that are on file at Washington?

A. Yes sir.

By Mr. O'LAUGHLIN:

Q. Do you know these are or are not copies of anything; were they made by you, for you or in your presence?

A. No, they weren't made by me or in my presence, but when we submitted those orders to the Interstate Commerce Commission we kept copies and that is what is turned over to me as those copies.

Q. This is what was turned over to you as being copies?

A. Yes sir.

Now we renew our objections to these.

Q. Are or are not the originals of the correspondence filed with the Interstate Commerce Commission if [in] the course of the hearing before them of the Railroad Company, in the files now of the Railroad Company?

A. They are not.

Q. Have they been got back by the Railroad Company from the Interstate Commerce Commission?

A. Not that I know of. I think Glasgow has them.

Mr. COLE: These papers having been produced in answer to the subpoena to produce these telegrams and in connection with the explanation of the witness, they are offered as primary evidence.

61 The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

By Mr. COLE:

Q. Mr. Trump, who is S. C. L.?

A. S. C. Long.

Q. What is his business?

A. At that time I think he was Superintendent of the Pittsburg Division.

Q. Did he have anything to do with the distribution of cars?

A. As far as his own division was concerned.

Mr. COLE: (Reading copies of telegrams offered in evidence.)

"S. C. L. Our efforts this week in keeping Scalp supplied with cars have not been at all successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or any of the South Fork Railroad equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice, and it is important that

sufficient cars should be placed early each morning so that all the mines will have a supply to start with and there will be no danger of any of the operations being idle on account of not having cars. To protect ourselves on this arrangement, I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledge receipt. G. W. C. 6/14/03."

62 That would be June 14th, 1903.

"S. C. L. Commencing at once, if we place equal to 500 cars at Scalp for loading and have the cars there in time for the mines to start in the morning it will be satisfactory. This for the present will cancel the special instructions issued sometime ago practically that from 250 to 300 cars be standing over each night. Our reports this morning indicate that we have equal to 1,028 cars in sight for today's loading, which will give us at least 550 in sight for tomorrow. Therefore, any cars you get from Altoona today other than the Berwind-White Coal Mining Company steel cars should be distributed to the best advantage on the Mountain and South Fork Railroad. Line. G. W. Creighton."

Q. What does that word "line" mean?

A. Please acknowledge receipt or something of that kind.

"Philadelphia, 7/21-1903. G. W. C.: Please do not disturb the instructions in regard to keeping the Scalp Level territory fully supplied with coal cars. We have had talk with Berwind-White Mining Company in regard to the coal in [en] route from Hersimus and they have arranged to cut down the shipments. Silver. R. M. P."

Q. What is the meaning of the word "silver"?

A. See your message of even date.

"S. C. Long, Pittsburg. If you place equal to 175 cars at Scalp during the balance of this week daily, it will be satisfactory. Any more than this number you have should be placed to the best advantage on the South Fork Railroad and Mountain, giving the large operations such as Webster, Stineman on South Fork and other operations of this class preference. Acknowledge receipt. G. W. Creighton. July 29, '03."

63 "S. C. L. Commencing with the distribution on Monday, August 3, please arrange to protect the Scalp Level operation to the extent of equal to 500 cars daily. G. W. Creighton. 8/1/03."

"S. C. Long, Pittsburg. It is now desired to give Scalp, including Yellow Run, 375 to 400 cars daily until further notice. G. W. Creighton. 12/22/03."

"S. C. Long, Pittsburg. Please place equal to 250 cars at Scalp, including Yellow Run, tomorrow. The same number on Thurs-

day. We will advise you later as to the number of cars to place on Saturday. G. W. Creighton. 12/22/03."

"G. W. Creighton. We are falling behind in our steamship contracts in New York and the Berwind-White people have got to unload on Sunday. Under these circumstances please arrange to give them a full supply of cars tomorrow and Saturday. This is to be understood as a special order. Line. R. M. Patterson."

"G. W. Creighton. Please see that Scalp Level gets a full supply of empty coal cars tomorrow, and after taking care of the company coal orders please arrange to give Scalp a full supply of empty coal cars every day this week thereafter. You may consider this a special order. 12/12/1904. R. M. Patterson."

Q. Mr. Trump, so far as you know were these orders carried out?

A. Well I can't say. The evidence seems to show they were not in all cases carried out.

Q. Were they substantially carried out?

A. I think so, yes.

* * * * *

64 H. L. SPOTTSWOOD, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Do you have charge of the car distribution sheets of the Pennsylvania Railroad at Altoona?

A. At the present time, yes sir.

Q. Do you have the sheets for April 1, 1903 to April 1, 1907, in the Mountain and Scalp Level districts?

A. Yes sir.

Q. Where are they?

A. They are over in the lawyer's office.

Q. Do you know what constitutes the Mountain District?

A. Yes sir, from Altoona to about Conemaugh, about 60 or 64 mines.

Q. West of Altoona along the main line?

A. Along the main line, yes sir.

Q. The Sonman Shaft operation was on that Division, was it?

A. On that division.

Q. Where does the Scalp Level and South Fork Division branch from the Mountain Division?

A. From South Fork out.

Q. In what direction?

A. From the main line towards the Scalp territory.

Q. South?

A. I don't know the direction.

65 Q. Is it part of the Mountain Division or an independent division?

A. Independent division.

Q. Do you know what the relative size of these two divisions was in the period from 1903 to 1907?

A. I do by referring to some figures I have.

Q. Give the tonnage comparisons of the two divisions from your figures? That you may understand, Mr. Spottswood, what I want is the rated capacities.

A. In accordance with the method, the way we handled our distribution?

Q. The rated capacities as you had them designated on your sheets at that time?

A. I didn't work these figures up, but I would believe them to be all right as far as I know.

Q. Who worked them up?

A. Probably some of the boys in my office. I don't know which one, we had so many.

Q. Let me see them?

A. What I mean, you are only interested in cars free of cards.

Q. No, what I asked was the respective ratings of the two divisions. For instance whether a particular time rating of 50,000 tons was given one and 49,000 tons to the other?

A. That is not on this. You will have to get the sheets. You want it for the period of the suit.

Mr. O'LAUGHLIN: You can't have those papers. They have no relation to what you are asking this witness.

A. I will get you the papers you want.

* * * * *

66 E. F. SAXMAN recalled on part of Plaintiff.

By Mr. LIVERIGHT:

Q. There apparently in a few instances are no destinations shown on shipments made from the Sonman mine in 1903. For instance, shipments to James Boyd or to Webster or certain other purchasers who bought f. o. b. cars at the mines. What frequently were the practices of those shippers?

A. In many cases that coal was just manifested Altoona scales to the buyer.

Q. That is to Boyd & Company or Newton & Company?

A. I can't say who, but that is the usual practice. It is practiced today. I do it myself right now.

Q. And did your Company know where it went after that?

A. No sir. I probably have been buying from the Sonman Shaft Company lately and I have it shipped in my own name and have it reconsigned at the scales to destination.

Cross-examination.

By Mr. BIKLE:

Q. That is rather frequently the case?

A. Yes.

Q. The coal is reconsigned in transit?

A. Yes sir, right along.

Q. Is Altoona a customary point to which coal is first manifested for that purpose?

A. I believe it is. It is the closest. It was when I had Sonman. It was closest to Sonman. Where the coal was weighed, it was sent there to the scale and reconsigned from the scales. I suppose if I was shipping from Latrobe it would go to Derry.

Q. That is rather customary?

67 A. It was years ago.

Q. So it would be impossible in that case when a car left your mine to know what its destination would prove to be?

A. We didn't know.

By the COURT:

Q. You didn't want the other fellow to steal your trade?

A. That is about it.

By Mr. LIVERIGHT:

Q. Did the Sonman Company have anything at all to do with reconsigning it when it got to the scales?

A. No sir, we knew nothing whatever about it.

68 H. L. SPOOTSWOOD recalled on part of plaintiff.

By Mr. LIVERIGHT:

Q. Take the distribution of the South Fork & Scalp Level Division of the Railroad Company, for April 30th, 1903, what was the total rating for that day?

Mr. BIKLE: We ask the purpose of this offer.

Mr. LIVERIGHT: The purpose of the offer is to show the proportion of the cars of the South Fork & Scalp Level branch to which the Pennsylvania Railroad Company, on its sheet, indicated that the Berwind-White Coal Mining Company was entitled.

Mr. BIKLE: It is objected to, if the Court please, as incompetent and irrelevant, because there is no allegation in the declaration that there was any discrimination as between the plaintiff and the Coal Mining Company named in respect to the cars to which under the system of distribution then prevailing each company was respectively entitled. That the only allegation of discrimination is in respect to the number of cars that each company referred to, to wit, the plaintiff and Berwind-White Coal Mining Company, actually received.

Mr. LIVERIGHT: This — to be followed by proof that the South Fork & Scalp Level Division on which these mines of the Berwind-White Coal Mining Company are situate, received an undue number of cars out of the total number.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

By Mr. LIVERIGHT:

Q. Take the distribution of the South Fork & Scalp Level Division of the Railroad Company, for April 30th, 1903, what was the total rating for that day?

A. You mean cars ordered?

Q. No, the total rating?

A. Wouldn't the cars ordered have a bearing on it?

Q. I ask you what the total ratings of the Division for that day were?

A. On the sheet it shows 762 cars.

Q. That corresponds with the testimony you gave yesterday, doesn't it?

A. Well I would say it did.

Q. Of that rating how much rating in cars was accorded the mines known as Berwind-White mines, being the Yellow Run Coal Company and Eureka Mines?

69 Mr. BIKLE: We object for the same reason, that the question of rating has not been averred as an element of discrimination but only the subject matter of distribution.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

By Mr. LIVERIGHT:

Q. Of that rating how much rating in cars was accorded the mines known as Berwind-White mines, being the Yellow Run Coal Company and Eureka Mines?

A. 605 cars.

Q. You testified yesterday that the Division rating in May, 1903, was 20,525 tons. How much of that rating was accorded to the Berwind-White mines?

Mr. BIKLE: The same objection.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

A. 16,500 tons.

By Mr. LIVERIGHT:

Q. You stated that in February, 1904, the rating for the South Fork and Scalp Level Division was 21,175 tons. Of that rating how much was accorded to the Berwind-White mines?

Mr. BIKLE: The same objection.

The COURT: Objection overruled, evidence admitted, exception noted for defendant and bill sealed.

A. 16,500 tons.

By Mr. LIVERIGHT:

Q. Of the rating for May, 1904, given by you as 21,325 tons for the Division, what was the rating to the Berwind-White mines?

A. 16,500 tons.

70 Cross-examination.

By Mr. O'LAUGHLIN:

Q. These are all net tons, aren't they?

A. Yes sir.

Q. The total rating for the Division is that shown by the dis-

tribution sheets, as well as the total given for Berwind-White being shown as the rating on the distribution sheets?

A. Yes sir.

71 VANCE C. McCORMICK recalled on part of defendant.

* * * * *

By Mr. O'LAUGHLIN:

Q. Did or did you not, from April 1st, 1903 to April 1st, 1907, at any time know the rating the Railroad Company had given your Company?

A. Know the rating?

Q. Know the rating which the Railroad Company on its papers had given your Company?

A. Yes, I think so.

Q. In what way?

A. Well I ascertained it from hearsay. I didn't see it on the rating card but we were advised by the Railroad Company, I don't know exactly how, that we had 35 cars a day for a period. That ran up I think till the first of May 1903, then I think the rating was 750 tons a day after that.

* * * * *

72 G. W. GREIGHTON, called on part of defendant, being duly sworn and examined, testified as follows:

* * * * *

Q. During the time of this action, from April 1903 to that time in 1907, was there any time when the bituminous coal equipment, any percentage of them were not being used by the shippers?

A. I imagine that there were, yes.

Mr. LIVERIGHT: We object to the answer and ask to have it stricken out.

A. I can answer it positively.

By the COURT:

Q. You say during the period of the action?

Mr. LIVERIGHT: The witness has said, I imagine that there were.

The COURT: Now he says positively.

By Mr. O'LAUGHLIN:

Q. Were there coal cars stored and unused during that time?

A. Yes.

* * * * *

73 J. W. MANLY called on part of defendant, being duly affirmed and examined, testified as follows:

* * * * *

By Mr. O'LAUGHLIN:

Q. Have you a record there for April 28th, 1904?

A. Yes sir.

Q. What are shown to be the empty cars by that record to have been on the Pennsylvania Railroad lines, empty bituminous coal cars; they would be stored cars, what I mean by that?

A. We have on that date 900.

Q. 900 stored bituminous coal cars?

A. 915 there are. They are not——

By Mr. LIVERIGHT:

Q. You didn't finish that answer?

A. Our records don't separate the coal cars.

— I move to strike the question out.

By Mr. O'LAUGHLIN:

Q. Were or were not there unused and stored bituminous coal cars on the lines during the period of this action?

A. Yes sir.

Q. Were or were not there unconsigned loaded cars which were loaded with bituminous coal on the lines during the term of this action?

A. Yes sir.

Mr. COLE: No cross-examination.

74

(Copy of Plaintiff's Exhibit No. 43.)

"Basis of 25 Tons to a Car."

Date.	Cars ordered.	Cars delivered.	Add steel to equal two cars	Total cars delivered counting steel as two.
1903.				
April	830	106	68	174
May	619	66	44	110
June	664	116	60	185
July	654	84	54	138
Aug.	728	160	138	298
Sept.	763	125	90	224
Oct.	945	123	60	183
Nov.	770	126	79	205
Dec.	722	180	102	282
1904.				
Jan'y	618	58	35	93
Feb'y	704	134	61	195
Mar.	739	78	63	141
April	655	116	59	175
May	711	219	163	382
June	331	134	100	243
July	174	144	115	259
Aug.	251	173	140	322
Sept.	80	63	53	116
Oct. to May, 1905, Flood				
1905.				
May	14	12	2	14
June	225	131	42	173
July	297	155	110	263
Aug.	760	154	95	249
Sept.	658	116	80	196
Oct.	662	145	49	194
Nov.	778	268	63	331
	14352	3186	1961	5147"

Plaintiff's Points.

"(1.) It is the duty of a railroad company to transport the freight and all the freight any customer may desire to load or ship at all reasonable times as offered. By this it is not meant that in times of stress and under abnormal conditions the railroad company must be prepared to furnish transportation facilities to meet every demand of intending shippers, but in ordinary times it is bound by the law to furnish such reasonably adequate facilities."

That point is affirmed.

76 "(2.) It is the duty of a railroad company in a period of normal demands for coal to furnish an operator along its lines whom it has recognized as a coal producer, with an adequate and sufficient supply of coal cars in which to load and have transported such coal as he in good faith seeks to load and have transported."

That point is affirmed.

"(3.) No duty of the defendant to receive and haul private coal cars for owners thereof, and to place them at the mines of said owners along its tracks, nor any right of the defendant to distribute cars as it saw fit, for its own fuel supply, excused the defendant in times of normal and ordinary demand for coal from furnishing the plaintiff with a reasonably adequate and sufficient supply of cars for the loading and transportation of its product, if the plaintiff in good faith made requisition for such cars."

That point is affirmed.

Affirmed.

"(5.) If the jury find from the fair weight of the evidence the following facts, then the plaintiff is entitled to recover:

- (a) That it was prepared and able to mine and ship the coal that it here claims the right to ship.
- 77 (b) That it had a market within the State of Pennsylvania for said coal, and could have sold it at a profit.
- (c) That it demanded from the defendant the cars and facilities for shipping said coal.
- (d) That the defendant failed and neglected to furnish said facilities.
- (e) That the times and conditions were normal and not unusual.
- (f) That by reason of the defendant's conduct and the loss of sales of coal, the plaintiff sustained loss and damage.
- (g) The amount of said loss or damage, evidence from which you can liquidate the same."

Affirmed.

* * * * *

"(7.) If the jury find in favor of the plaintiff it is entitled to damages measured by the difference between the cost of mining and delivering the coal on the railroad cars, adding thereto the royalty paid, and the fair average selling price prevailing in the region where Sonman mine was situate, between April 1, 1903 and April 1, 1907, upon all coal which the jury find from the evidence the Sonman Shaft Coal Co. could and would have been reasonably able

to mine and sell f. o. b. cars at mines, except for the refusal of the defendant to furnish the facilities for loading and shipping said coal."

Affirmed.

"(8.) If the jury find in favor of the plaintiff, the plaintiff would also be entitled to recover any loss it sustained on coal actually mines and sold f. o. b. cars at mines during the period of the action, by reason of any increase in the cost of production that was caused through the failure of the defendant to furnish an adequate supply of cars to keep the plaintiff's mine running to its fair, reasonable capacity. The measure of that loss would be the difference between the actual cost for what was actually produced and sold f. o. b. cars at mines and what it would have cost to produce the same had an adequate supply of cars been furnished."

Affirmed.

* * * * *

78

Defendant's Points.

* * * * *

"3. There was no duty on the defendant company to place cars at the plaintiff's mine except on order given by the plaintiff to the defendant, and there can be no recovery in this action for any tonnage that might have been shipped in cars that were not actually ordered."

This point is affirmed.

"4. The defendant having established a system of distributing its cars available for use in the transportation of bituminous coal, there was no duty resting upon it to place cars at the plaintiff's mine unless orders were made by plaintiff and then only for the plaintiff's pro rata share of cars under the established system of distribution."

This point as a whole is refused. At times of abnormal conditions or stress in the coal market which occasions an undue shortage of cars, the defendant company has a right to establish a pro rata system of distribution, but in ordinary times it is the duty of the defendant company to furnish cars upon requisitions made in good faith.

Mr. COLE: Now, we ask at this point, your Honor, to say that under the testimony on both sides these were normal times and the defendant admits it had cars in that vicinity that were not in use.

The COURT: Well I have gone over that part of it and the jury recalls that. There is no testimony disputing the claim of the plaintiff that these were normal times, and I think there is also no dispute, or it came at least from the witnesses on part of the defendant on cross-examination, that there were cars not in use in that region.

* * * * *

79

History of the Case.

From 1903 to 1907 plaintiff was engaged in mining coal on the Mountain Division of the Pennsylvania Railroad. It had a well equipped plant, a large body of minerals of first quality, a compe-

tent selling force, and orders for coal to its capacity. On an adjoining division the mines of the Berwind-White Coal Mining Company were situated, and further west those of the Keystone Coal & Coke Company. The trade conditions of the bituminous coal business were average, normal and ordinary. The car equipment of the defendant was a burden on its hands, was lying on storage sidings, and coal generally was sluggish on the market. By reason of its superiority, plaintiff's coal was always in demand. Plaintiff made requisition day by day for a car supply in the manner and at the time prescribed by the orders of the defendant. It supplemented these requisitions by personal calls upon the executive heads of defendant, by correspondence and by telephone demands, urging that it be given a car supply commensurate with its needs and its business.

At all times the defendant had on its records, for use in times of emergency and of car shortage, a system of coal car distribution, by which owners of coal mines were supposed to be regulated at such unusual periods. In times of free car supply the rating and distribution rules were purely negligible. During a portion of the time covered by the action, the distribution sheets of the defendant showed that the latter was able to meet one hundred per cent. of the demands of all coal operators, if it wished.

Notwithstanding the car surplus, plaintiff was unable to get a supply at all adequate or sufficient for its business needs. In vain it called upon defendant to observe its obligations. At times
80 defendant admitted that plaintiff was not being justly treated, at other times it maintained silence, and upon occasion it shielded itself behind a distribution or a rating rule.

During a large part of the action cars that were properly distributable to plaintiff were, with others, diverted to the Berwind mines. For this conduct defendant offered no excuse whatsoever. Berwind, in addition, had a great number of private cars, as did the Keystone and other companies, competitive with plaintiff.

Conditions continued unbearable for plaintiff. In a period of car plenty it received from fifteen to forty per cent. of the car equipment needed for its trade, its coal business was being run at a loss, and its orders were drifting to Berwind and others fortunate enough in some manner to command a car supply. Plaintiff could not assure deliveries of its coal, for which its customers were clamoring, because defendant would not perform its charter obligations. Business drifted to competitors, who were able by some means to guarantee reasonably regular deliveries. Finally, plaintiff saw the writing on the wall, and rather than run its organization at a constant loss, it sold part of its coal to Berwind and Keystone and others in a position to command a car supply from defendant. These competitors thereupon assumed the place of the defendant as a common carrier, saw that the plaintiff got cars in such measure as their own needs might justify and require, and plaintiff's coal shipments increased in volume. To accomplish this end, plaintiff was compelled to sell its coal to said competitors considerably below the

market. During the entire transaction defendant was amply able to fill all the requisitions of plaintiff to the uttermost degree.

Plaintiff brought action against defendant to recover damages for loss it had suffered at the hands of the latter, (a) by its discriminatory conduct in the distribution of cars; (b) by its failure to provide the plaintiff with an adequate and sufficient supply of cars under ordinary trade conditions.

Both branches of the action were made out by the proofs, and plaintiff established conclusively that defendant had violated its common law duty as a carrier. Although the discrimination was proven, the damages on that branch of the case were not liquidated. The amount of injury that had been sustained on the other branch was left to the jury which found that by reason of loss of profits on unmined coal, and loss sustained through excessive cost of producing coal actually mined, plaintiff should be compensated in the sum of \$145,830.25.

82

SONMAN SHAFT COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, In and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the additional portions of the record as required by præcipe filed by Defendant in Error, so full and entire as appears of Record in said Court.

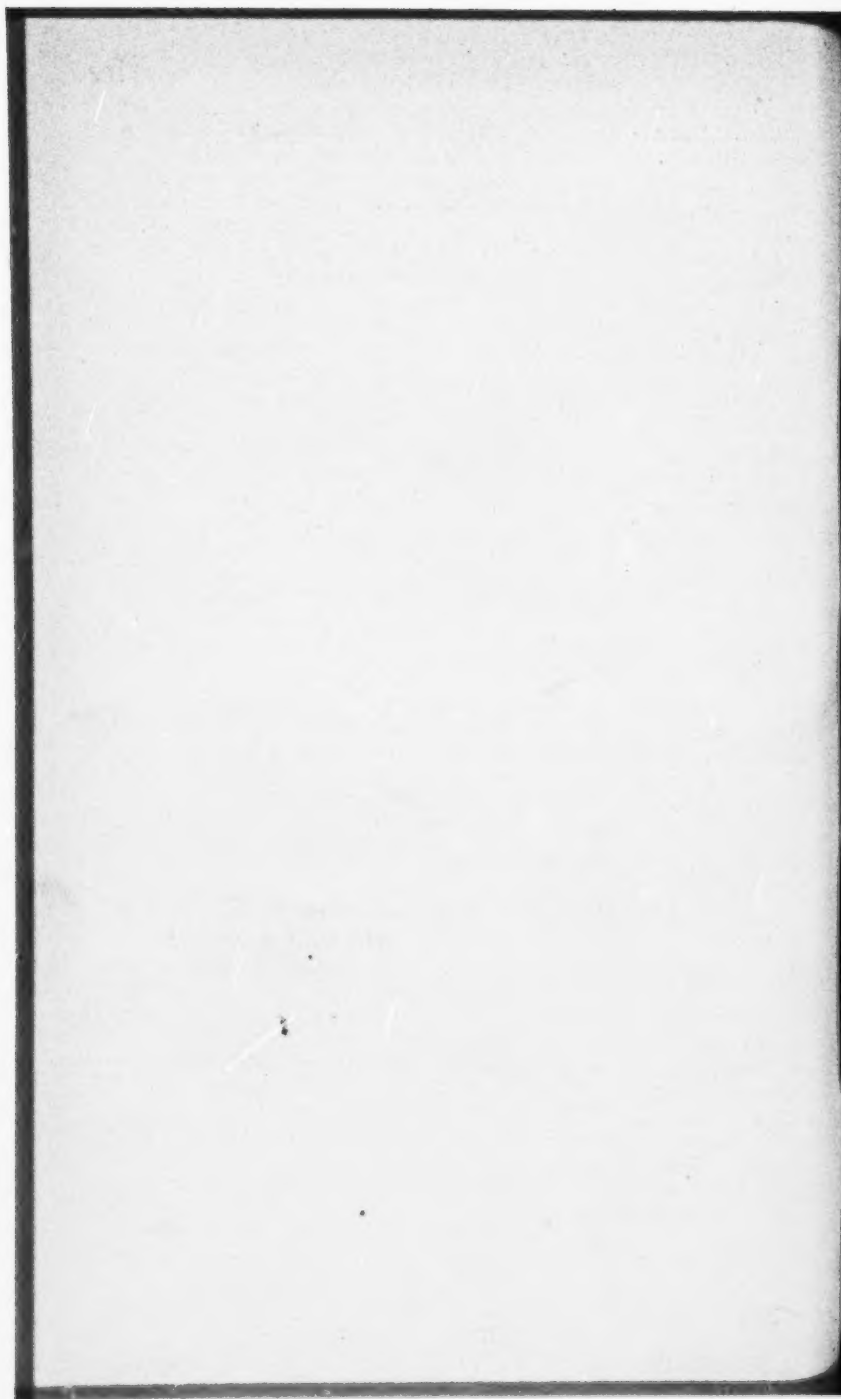
In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 17th day of December, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

[Endorsed:] File No. 23,923. Supreme Court U. S., October Term, 1913. Term No. 288. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Sonman Shaft Coal Company. Additional record ordered to stand as return to writ of certiorari. Filed March 23, 1914.

Endorsed on cover: File No. 23,923. Pennsylvania Supreme Court. Term No. 288. The Pennsylvania Railroad Company, plaintiff in error, vs. Sonman Shaft Coal Company. Filed October 30th, 1913. File No. 23,923.



No. **10**

10

FILED

MAR 4 1915

JAMES D. MAHER

OCTOBER TERM, 1914

Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

SONMAN SHAFT COAL COMPANY.

**IN ERROR TO THE SUPREME COURT OF THE STATE
OF PENNSYLVANIA.**

BRIEF OF PLAINTIFF IN ERROR.

**F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,**

For Plaintiff in Error.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914. No. 288.

The Pennsylvania Railroad Company, Plaintiff in Error

vs.

Sonman Shaft Coal Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Pennsylvania Railroad Company, the plaintiff in error, and the defendant below, was engaged during the period of the action in transporting bituminous coal from mines in Pennsylvania to points both within and without that State, and the Sonman Shaft Coal Company, the defendant in error, and the plaintiff below, had been during such period a shipper over its lines.

The Coal Company instituted the present action in a State Court of Pennsylvania to recover damages be-

cause of the alleged failure of the Railroad Company to furnish it with all the cars which it claimed it should have received for its shipments. By its declaration or Statement of Claim, the Coal Company rested its claim upon two distinct grounds, one, failure of the Railroad Company to deliver to it all the cars which it had demanded, and the other, failure to deliver the cars which the Coal Company was entitled to receive as its fair share of those which the Railroad Company had available for distribution in the period of the action.

The aggregate capacity of the mines on the Railroad Company's lines was very largely in excess of any probable shipments therefrom, due to the fact that the mines were capable of producing a far greater output than any available markets would take or consume.

The Railroad Company had consequently established a system of allotment and distribution of cars, and during the period of the action a *pro rata* distribution had been made of the cars available for distribution.

While some testimony was introduced upon the trial which it was claimed by the Coal Company tended to show that it had not received its proper share of the cars which had been distributed, its claim on this branch of the case was abandoned, as will appear from the following extract from the charge of the trial Judge:

"We have, therefore, in this case only to consider virtually but one branch of the claim, because the plaintiff's counsel have also eliminated the question of damages incident to what is called discrimination or favoritism, if any, practiced by the defendant." (Transcript of Record, page 91.)

The branch of the claim which was left for consideration, and as to which the Coal Company recovered, had for its basis the failure of the Railroad Company to deliver to the Coal Company all the cars which it claimed it could have made use of, its right to recover on this ground being rested upon an alleged common law duty

or obligation of carriers to furnish to shippers all the cars which they required in normal times and under normal conditions, which was thus defined by the trial Judge in his charge to the jury:

"What the plaintiff, therefore, is entitled to recover at your hands, if you find it is entitled to recover at all in this suit, is the amount which will compensate it for the alleged failure of the defendant company to do its duty as a common carrier to the plaintiff in failing to furnish an adequate supply of cars." (Transcript of Record, page 91.)

The "adequate supply of cars" thus referred to was an adequate supply for the Coal Company, not for the shippers as a whole on the lines of the Railroad Company, for under the instructions of the trial Judge it was necessary for the jury to find as a prerequisite to any recovery by the Coal Company that the Railroad Company, to quote from the charge "had a generally ample car supply for the needs of the coal business in normal times and under normal conditions." (Transcript of Record, page 95.)

The verdict of the jury in favor of the Coal Company was necessarily, therefore, based upon a finding that the Railroad Company had had an adequate supply of coal cars for the needs of the coal business on its lines, but the Coal Company recovered because the Railroad Company had not delivered to it all of the cars for which it alleged it had made demands.

The Railroad Company in respect to its coal business was engaged in interstate transportation. It transported the coal originating at the mines on its line, all of which were within the State of Pennsylvania, to points both within and without that State; its coal cars were used indiscriminately for both classes of shipments all of them being available for interstate shipments at the election of the shippers to whom they were delivered.

(Transcript of Record, page 79.)

It was admitted by the Railroad Company that it had not delivered to the Coal Company all the cars included in requisitions or orders therefor received from the Coal Company, but it denied that it had not delivered all the cars which the Coal Company was entitled to under the system of allotment and distribution in force during the period of the action.

In respect to the right of the Coal Company to recover because the cars delivered to it had not been equal in number to those for which it had made requests, the Railroad Company's contentions, all of which were overruled by the Supreme Court of Pennsylvania, were these:

1. That the only obligations to which it was subject in respect to the delivery of cars to shippers for interstate shipments were those which had been imposed upon it by the Interstate Commerce Act, and if these had been disregarded to the injury of the defendant in error, its remedies were only such as that Act had prescribed, and these did not include actions in State Courts.

2. That whether its duty was to be measured by the obligations devolved upon it by the Interstate Commerce Act or by the common law, it had fully conformed thereto when it had equipped itself with a supply of cars adequate for the demands of the coal business on its lines, and had made a proper *pro rata* distribution of these among shippers when conditions made necessary such a method of distribution.

3. That the Coal Company had made no demands for cars other than those properly allottable to it under the system of distribution in force during the period of the action, and that it was incumbent upon the Coal Company as a necessary prerequisite to any claim for damages based upon failure of the Railroad Company to conform to the common law obligation or duty which the Coal Company had invoked to make prior reasonable demands for the cars desired, and as these demands had

not been made, the Coal Company had not established a case of violation of the common law obligation in question, even supposing it to be still in force and unaffected by the enactment of the Interstate Commerce Act.

In respect to the first of the above contentions, the Coal Company sought to sustain the jurisdiction of the State Court upon the ground that all of the cars for the non-receipt of which it sought to hold the Railroad Company liable would have been used in intrastate commerce. It admitted that a portion of them would have been used for the shipment of coal to points outside the State of Pennsylvania, but claimed that these cars would not have been used in interstate commerce or transportation because the coal which would have been shipped therein would have been sold by the Coal Company at the mines and its use of the cars would consequently have been restricted to the mere loading thereof. This fact, it contended, made the cars, so far as it was concerned, intrastate vehicles of transportation, notwithstanding the fact that the actual transportation of the cars and of the lading therein would have been to points without the State.

In respect to the second contention, the Coal Company's position was that the Railroad Company was not merely obliged as a common carrier to provide itself with an adequate supply of coal cars, but was further obliged to furnish each shipper on its lines with all the cars demanded by it subject only to the qualification that the demands made did not exceed the actual ability of the shipper to load and ship coal therein, even though the cars thus demanded were in excess, having regard to the demands of all shippers, of the number which the Coal Company could fairly claim as its *pro rata* share under a proper system of distribution.

In respect to the third contention, the Coal Company's claim was that the orders or requisitions which it had made for cars constituted sufficient demands within the rule of law invoked by the Railroad Company.

The only demands made by the Coal Company for cars were the regular orders or requisitions which it had put in daily in order to conform to the system of distribution which the Railroad Company had in force, these orders or requisitions being required in order that a *pro rata* allotment and distribution of the available cars based upon such requisitions might be made by the Railroad Company. No other demands for cars were made, nor was it shown that the Railroad Company was advised that the Coal Company was demanding or was desirous of securing any cars in excess of its share of those available for distribution. Many remonstrances and complaints were addressed by it to the Railroad Company, but these all had reference either to the alleged unfairness of the system of distribution which was being pursued or to the failure of the Railroad Company to conform in its actual distribution to this system.

In addition to the contentions of the Railroad Company which have been already referred to, it offered to prove upon the trial that continuously throughout the period of the action a large number of its cars were off its own lines and on the lines of other carriers, these having been delivered to these other carriers loaded with coal consigned to points outside the State of Pennsylvania, and that had these cars been confined to its own lines, the number of cars available for the Coal Company would have been largely increased. This evidence upon the objection of the Coal Company was excluded by the Court.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“1. The Court below erred in charging the jury as follows:

“‘It is first contended on behalf of the defendant that the said court does not have jurisdiction, for the

reason that the United States Congress has conferred entire jurisdiction upon the Federal Courts or other tribunals established by Congress, and that hence there is no right of recovery for any failure of duty in furnishing car facilities in the State Courts, of which this is one. This contention, as you have noticed, we have overruled.' "

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"2. The Court below erred in charging the jury as follows:

" 'It is again further contended that only such portion of the coal which may have been or was intended ultimately to be delivered within the State of Pennsylvania could be recovered in this action. With this contention we also disagree with the learned Counsel and hold that where coal is sold f. o. b. cars at the mines it is a Pennsylvania delivery and that the right of action is in the State Courts for failure of a common carrier to perform its common law or statutory duty.' "

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"3. The Court below erred in affirming the plaintiff's sixth point, this point and the answer thereto being as follows:

" '(6.) If the Jury find that the plaintiff is entitled to recover from the defendant, it is entitled to a verdict for whatever damages it appears from the evidence it sustained by reason of the wrongful acts of the defendant, upon all coal which was mined and sold f. o. b. cars at its mines, between April 1, 1903, and April, 1907, or which in that period could and would have been mined and sold f. o. b. cars at Sonman mine, but for the wrongful acts of the defendant.' "

"Answer. 'Affirmed.' "

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“4. The Court below erred in refusing to charge as requested in the defendant's fifteenth point, this point and the answer thereto being as follows:

“‘15. The plaintiff's right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, to points inside the State of Pennsylvania and there can be no recovery in this action for damages, if any, resulting from the plaintiff's inability to sell coal f. o. b. cars at its mines consigned by it to points outside the State of Pennsylvania.’

“*Answer.* ‘That point is refused.’”

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“5. The Court below erred in charging the jury as follows:

“‘It is further contended on the part of the defendant that the rule of law to which we have heretofore referred which requires a common carrier in ordinary times and under ordinary conditions to have and furnish an adequate and sufficient supply of cars, does not mean that the common carrier is bound to furnish just the number of cars demanded or for which requisition is made by an individual shipper, as was this plaintiff. It is contended in its behalf that the defendant, as a common carrier, had a sufficient and adequate supply of cars for ordinary times in the coal trade as a whole, but that because, taking the whole number of shippers in the region, the demand far exceeded the supply, and as they infer, would exceed the necessities of the trade, they were obliged to, and in fact did, apportion or allot their coal cars according to a *pro rata* schedule based on the ratings of the several mines. With this

contention we do not agree. The result of that contention, worked out to its logical conclusion, would lead to the undue and unreasonable discrimination expressly forbidden.' "

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"7. The Court below erred in refusing to charge the jury as requested in the defendant's fifth point, this point and the answer thereto being as follows:

"5. The plaintiff can in no event recover for an alleged shortage in the number of cars furnished it beyond what its *pro rata* share of cars would have been under the established system of distribution.'

"Answer. 'That point is refused for the reason that there is no testimony to show that there was any abnormal condition in the coal business entitling the defendant to refuse a *bona fide* demand for cars.'

7. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"8. The Court below erred in refusing to charge the jury as requested in the defendant's twelfth point, this point and the answer thereto being as follows:

"12. The evidence does not disclose any general shortage of equipment on the part of the defendant, and, accordingly, the plaintiff cannot recover for the failure of the defendant to furnish cars in excess of the plaintiff's allotable share of the equipment of the defendant available for distribution under the defendant's system of distribution in effect during the period of the action.'

"Answer. 'That point is refused.'

8. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"9. The Court below erred in refusing to charge the jury as requested in the defendant's second point, this point being as follows:

"'2. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should, therefore, be for the defendant.'"

9. The Supreme Court of Pennsylvania error in overruling and dismissing the following assignment of error:—

"10. The Court below erred in sustaining the objection made upon behalf of the plaintiff to the defendant's offer of testimony which is embodied in the following offer made by its counsel:

"The defendant offers to prove by the witness on the stand that during all of the period of this action the defendant had in effect on and for shipments of bituminous coal through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive.

"MR. LIVERIGHT:—Objected to, first, as immaterial and irrelevant, second, as being no answer to the complaint made in this case or the testimony adduced in this case; and third, as being entirely inconsistent with their own testimony that they have already put in.

"THE COURT:—Objection sustained, evidence excluded, exception noted and bill sealed for defendant.'"

10. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“11. The Court below erred in overruling the motion of the defendant to dismiss the action for want of jurisdiction to entertain the same.”

11. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“12. The Court below erred in overruling the motion of the defendant for judgment *non obstante veredicto*.”

12. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“13. The Court below erred in entering judgment on the verdict in favor of the plaintiff.”

ARGUMENT.

STATE COURT WITHOUT JURISDICTION TO ENTERTAIN THE ACTION.

By the Interstate Commerce Act the Congress of the United States has undertaken to regulate the subject of interstate transportation by Railroad Companies, has prescribed the rules to be observed by them in the conduct of such transportation, and has defined the remedy available to any one claiming to be damaged because of non-observance of obligations or prohibitions contained in the Act.

The remedy is that which is provided by section 9 of the Act which reads as follows:

“That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for or may

bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act in any district or circuit court of the United States of competent jurisdiction. * * *

If, therefore, in the present case the question whether the plaintiff in error was in default in respect to the matters complained of is to be determined with reference to the obligations and prohibitions contained in the Interstate Commerce Act, then it must necessarily follow, we submit, that the State Court was without jurisdiction to entertain the action because of the exclusive grant of power to the Federal tribunals contained in the ninth section of the Act.

The exclusive jurisdiction of the Federal tribunals in cases involving violations by common carriers of obligations imposed upon them by the Interstate Commerce Act has been recognized and enforced by this Court in two cases.

In *Chicago, etc., Railway Company vs. Hardwick Farmers Elevator Company*, 226 U. S. 426, it was said by Mr. Chief Justice White, referring to the obligations imposed by the Act upon common carriers to furnish cars and to the remedies provided for failure to observe these obligations:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty.

"Thus, by section 8 it is provided 'that in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this Act * * *.'

"Further by section 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages * * *." (Page 434.)

And in the case of Mitchell Coal & Coke Company *vs.* Pennsylvania Railroad Company, 230 U. S., 247, the Court, speaking by Mr. Justice Lamar, said in respect to the forum of actions brought to recover damages because of payments of rebates prohibited by the Act:

"The plaintiff's cause of action for damages occasioned by the payment of the illegal or unreasonable allowances was one which, under sections 8 and 9 of the Commerce Act (24 Stat. 382), could only be brought in a District or Circuit Court of the United States." (Page 250.)

In view of these pronouncements by this Court, it would seem to be indisputable that if the duty which it is averred the plaintiff in error failed to observe was one that, if it existed at all, was referable to the obligations imposed upon it by the Interstate Commerce Act, then necessarily the remedies available to the defendant in error for breach of such duty did not embrace an action in a State Court.

And the decisions to which we have referred are in accord not merely with the purpose and intent of section 9 as disclosed by its language, but as well with the intent of the framers of that section.

That it was the purpose of those who framed this section that State Courts should not have jurisdiction of actions of the present character is made evident by what took place in Congress when section 9 was under consideration in the House of Representatives.

The Bill embodying this section as finally enacted had been submitted by the House Conferees, and in the report which accompanied the Bill this statement was made:

"The Ninth section of the substitute Bill is a new section, which provides that persons claiming to have

been damaged by the action of common carriers may proceed for recovery of their damages either in the Courts of the United States or before the Commission herein provided for, as they may elect, but not before both tribunals. This section which gives jurisdiction to Courts of the United States does not give jurisdiction in civil suits to the State Courts as was provided for in the House Bill." (Congressional Record, Forty-ninth Congress, second session, Volume 18, part 1, page 698.)

And while section 9 was under discussion, in reply to the criticism that jurisdiction had not been conferred upon State Courts, Mr. Charles F. Crisp, one of the House Conferees, said:

"Objection is made by some gentlemen, who are in the main friendly to this Bill, because we have not conferred jurisdiction upon the State Courts to hear and determine these questions. Waiving for the present the question of our power by an Act of Congress to give to the Courts of a State jurisdiction to try a matter of this character—a statutory case—waiving that, I say to those gentlemen that if we had insisted upon putting that provision in this Bill we would have had no agreement. Under the Bill as it stands no great injustice or hardship can arise to the citizen." (*Id.*, page 784.)

To avoid the objection to the jurisdiction of the State Court the defendant in error relied upon two propositions, one that the duty or obligation for the non-observance of which by the plaintiff in error it claimed the right to recover was one which had been devolved upon the latter by the common law, and that this remained in full force and unaffected by the enactment of the Interstate Commerce Act, and the other, that even if that Act must be regarded as supplanting any common law requirement or obligation in respect

to the duty resting upon the plaintiff in error to furnish shippers in normal times with all the cars required and demanded by them for their shipments, this was true only as to cars intended for interstate use or transportation, and that the cars which the defendant in error claimed should have been delivered to it would not have been put to such use.

Waiving for the present the question of the extent and character of the common law obligation invoked by the defendant in error, it is to be considered whether, whatever may have been its character, it was supplanted and done away with in so far as concerns cars intended for interstate use by the enactment of the Interstate Commerce Act.

Speaking of the exclusive and paramount authority of Congress, when exerted, over the subject matter which is involved in the present action, viz., the delivery of cars to a shipper by a common carrier, this Court, in the case of the Chicago, etc., Railway Company *vs.* Hardwick Farmers Elevator Company, *supra*, said:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on the subject are supreme." (Page 435.)

In the case from which we have just quoted, the Court was dealing with the effect of the Interstate Commerce

Act upon State enactments. Necessarily, however, the same result must follow Congressional action when the question is to what extent has this action supplanted common law requirements or obligations, for of course the authority of Congress is as paramount against such requirements and obligations as it is against the legislation of a State. And if, therefore, a State enactment imposing an obligation as to delivery of cars by a common carrier was invalidated and made ineffective by the Interstate Commerce Act, it would seem inevitably to follow that obligations of the same character created or imposed by the common law were equally invalidated and rendered of no effect.

It would be, we submit, an anomaly to hold that action by Congress would have the effect of invalidating enactments of State Legislatures, but would be powerless to affect rules of conduct or action which were dependent for their existence upon the common law.

That no such distinction can be made, was recognized by this Court in the case of *Southern Railway Company vs. Reid*, 222 U. S., 424.

In that case the question was whether a Statute of the State of North Carolina which imposed penalties upon railroad companies for failure to promptly receive freight when tendered was effective, in view of the enactment of the Interstate Commerce Act, especially the Hepburn amendment thereof, for in that case the freight which had been tendered, and for the non-receipt of which the action had been brought, had been offered after this amendment had become operative.

The Supreme Court of North Carolina had held that the Statute in question was intended to enforce a common law duty, and that as this duty was not specifically dealt with or regulated by any Act of Congress, it continued enforceable, notwithstanding the passage of the Hepburn Act, and of the other legislation of Congress.

Disposing of this view or contention, this Court said:

"The Supreme Court of the State decided, as we have seen, that the Statute deals with a common

law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as follows:

"The statutory enforcement under penalty, of the common law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce.'

"We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted." (Page 440.)

And it is significant of the view which this Court held in respect to the effect of the interstate commerce legislation of Congress that in support of the conclusion which was announced and is embodied in the extract from the opinion above quoted the case of *Houston & Texas Central Railroad Company vs. Mayes*, 201 U. S., 321, was referred to and cited, the case thus cited having dealt with and construed the legislation of Congress as it existed prior to the passage of the Hepburn Act.

Has Congress, then, so legislated through the Interstate Commerce Act as to render of no effect the common law obligation upon which the defendant in error in the present case relied?

As to a portion of the period covered by the action there would seem to be no doubt as to the answer to this question.

In the case of *Chicago, etc., Railway Company vs. Hardwick Farmers Elevator Company*, *supra*, this Court was required to pass upon the question whether a statute of the State of Minnesota which made it the duty of a Railroad Company on demand of a shipper to furnish cars for the transportation of freight within a certain number of days after demand and imposed a penalty for non-observance of such duty,

had any application to demands for cars intended to be used for interstate shipments. In the case before the Court it appeared that the demands upon which the plaintiff in the case was relying in order to justify the action which had been brought to recover the penalties imposed by the Statute had been made after June 29, 1906—the date of the passage of the Hepburn Act—and all that the Court, therefore, was required to determine was whether subsequent to the enactment of that Act the Statute of Minnesota had any force or effect as to cars desired for interstate shipments.

The Hepburn Act defines "transportation" as including "cars and other vehicles and all instrumentalities and facilities for shipment or carriage," and makes it "the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

Concerning the purpose and effect of the enactment of this Act, this Court, speaking through Mr. Chief Justice White, said:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. * * *

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme." (Pages 434, 435.)

And in *Hampton vs. St. Louis, Iron Mountain & Southern Railway Company*, 227 U. S., 456, this Court held that if a Statute of the State of Arkansas which made it the duty of railroad companies to furnish cars upon demands of shippers were to be given a construction which would make it applicable to cars desired for interstate shipments, the Statute would be void under the decision in the *Hardwick Elevator Company* case.

"If, however," said Mr. Justice Lurton, delivering the opinion of the Court in that case, "it (*i. e.*, a certain clause of the statute) be construed as extending the act so as to regulate the furnishing of cars for interstate shipments, it would be invalid by reason of the provisions of the Hepburn Amendment to the act to regulate commerce of June 29, 1906." (Page 465.)

The necessary conclusion from these decisions, we submit, must be that after June 29, 1906, the plaintiff in error was in respect to any duty of the character involved in the present action subject only to whatever obligations had been devolved upon it in respect thereto by the Interstate Commerce Act.

But the period of the present action antedates the Hepburn Act, and the further question is consequently presented whether the legislation of Congress prior to the enactment of that Act had been of such a character as to supplant or make ineffective the so-called common law obligation relied upon by the defendant in error.

Until it enacted the Hepburn Act Congress had not seen fit to impose any direct or specific duty upon railroad companies to furnish cars to shippers for interstate transportation. It had, however, provided in the original Interstate Commerce Act that the provisions thereof should apply "to any common carrier or carriers engaged in the transportation of passengers or property," and had further declared that "the term 'transportation' shall include all instrumentalities of shipment or carriage."

Unquestionably cars are "instrumentalities of shipment or carriage," and it would seem to follow, therefore, that the obligations in respect to these instrumentalities of shipment or carriage embodied in the original Act comprised all that Congress thought it expedient to impose upon carriers.

It did not consider that the situation as it then existed required that an obligation should be imposed upon carriers to furnish cars upon the demands of shippers. It was no doubt the view of Congress that the selfish interests of the carriers would induce them to do all that was possible to meet the demands of shippers, as a shortage of equipment is more detrimental to the carrier than to shippers.

Congress did, as this Court has determined, impose certain obligations upon carriers in respect to the deliveries of cars, but these obligations went no further than to require that a just and relatively equal distribution should be made of the cars which the carrier had available when conditions rendered a *pro rata* distribution necessary.

After the passage of the original Interstate Commerce Act by an amendment thereto which was approved March 2, 1889, Congress conferred upon shippers a right to secure cars through application to the United States Courts, but the right thus conferred was to be available only in order to prevent discrimination in the distribution of a carrier's equipment or some other violation of the provisions of the Act. The amendment in question reads as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the Act to which this is a supplement, and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged or

upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

The enactment of this amendment clearly indicates that Congress had in mind the subject of a shipper's right to cars, but the duty to deliver cars upon a shipper's demand was not imposed upon the carrier by this amendment, nor did Congress impose upon carriers such an obligation until it passed the Hepburn Act.

But prior to the passage of this Act it had passed an Act to regulate common carriers, and had declared that such regulation extended to their "instrumentalities of shipment or carriage." In respect to these instrumentalities of shipment or carriage, it had imposed certain duties, but had refrained from imposing the specific duty with which we are concerned in the present case, and the question that would seem to be presented, therefore, is whether, assuming the pre-existence of such a duty, it continued in force after Congress had acted. In other words, did Congress by the enactment of the Interstate Commerce Act take possession of the whole field of regulation of a carrier's duty in respect to its equipment, or did it only partially do so, leaving open to other regulatory power all the duties of carriers in respect to their equipment save only that one as to which it had imposed an obligation, viz., the duty to make proper distribution of what equipment was available when conditions rendered a distribution necessary.

The decisions of this Court furnish, we submit, the answer to this question.

In *Erie Railroad Company vs. New York*, 233 U. S. 671, the Court was required to determine whether Congress by the enactment of the Hours of Service Law

had taken control of the subject matter of the Act to such an extent as to preclude further or additional regulation of the same subject by the States under their police power. It was held that such had been the result and in answer to the argument that the Federal Act had not legalized employment for the periods of time named therein and that consequently the States ought not to be debarred from putting such further limitations upon these periods as their local conditions made necessary, Mr. Justice McKenna, delivering the opinion of the Court, said:—

“We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

“Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the “Hours of Service” law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it.” (Page 683.)

May it not be equally said that the Interstate Commerce Act is the judgment of Congress of the extent of the obligations which it was thought expedient to put upon railroad companies in respect to equipment or cars for interstate transportation?

And in the case of *New York Central Railroad Company vs. Board of Freeholders of the County of Hudson*, 227 U. S., 248, where the question at issue was whether the Board of Freeholders could under an Act of the

State of New Jersey which empowered them to regulate the rates to be charged by ferry companies prescribe rates for a company whose boats were run in conjunction with the trains of an interstate railroad company, this Court held that the Board was without authority to prescribe or regulate such rates, even those which were applicable only to passengers using the boats of the ferry company for a local trip, and not as part of a combined railroad and ferry journey, because of the provision contained in the Interstate Commerce Act that:

"The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad."

Dealing with the effect and operation of this provision, Mr. Chief Justice White, delivering the opinion of the Court, said:—

"The result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. *In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being co-terminous with the authority over the subject as to which the purpose of Congress to take control was manifested*

* * * The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field and leaves nothing upon which the lesser power may operate." (Page 264.)

Applying to the case now before the Court the principle upon which this Court acted in the case just referred to, is not the conclusion not merely justified, but unavoidable, that as there were included within the scope and purview of the original Interstate Commerce Act of 1887, a carrier's "instrumentalities of shipment or carriage," in other words, its cars, and certain obligations in respect thereto were thereby imposed, the whole subject of the carrier's duty in respect to such cars and their use was as completely taken under the exclusive domination and control of Congress as were the rates of the ferry company in the case referred to.

Certainly there is nothing in the Interstate Commerce Act which indicates an intention on the part of Congress to exclude from its operation any of the elements of interstate commerce entering into that feature of interstate transportation which has to do with the duties of carriers in respect to their cars, and in the absence of language indicating such an intent, "the assertion of power on the part of Congress" should be treated "as being co-terminous with the authority over the subject."

In *Northern Pacific Railway Company vs. State of Washington*, 222 U. S. 370, this Court held that a Statute of the State of Washington regulating the hours of service of railroad employees was ineffective because of the Congressional legislation in respect to the same subject matter, even during a period of time which antedated the effective date of the Federal Act, because, as the Court put it, "the enactment by Congress of the Law in question was an assertion of its power, and by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

The mere exercise, therefore, by Congress of power to regulate the employees' hours of service was held in that case to put an end to all State or other authority in respect to the same subject matter.

These decisions and many others that might be quoted establish, we submit, the proposition for which we are contending, viz., that the legislation of Congress, even

prior to the Hepburn Act, as to the obligations of a carrier to its shippers in respect to its "instrumentalities of shipment or carriage," had been of such a character as to make its enactments the only guide for the conduct by carriers affected thereby of their interstate transportation, and that consequently these enactments are the measure and the only measure of a carrier's duties and obligations.

It is not necessary to determine to what extent, if any, a duty had been imposed upon carriers by the Interstate Commerce Act as it existed before the Hepburn amendment, to furnish to shippers cars sufficient for their needs, for even if such a duty had been imposed, and this duty had been disregarded by the plaintiff in error to the damage of the defendant in error, the latter should have proceeded elsewhere than it has done to secure the redress to which it was entitled.

The trial Judge, therefore, should have affirmed the point or request for charge submitted upon behalf of the plaintiff in error which is set forth in the ninth specification of error, which was to the following effect:—

"Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should, therefore, be for the defendant." (Transcript of Record, page 100.)

And the Court further erred in charging the jury upon the question of its jurisdiction as follows:—

"It is first contended on behalf of the defendant that the said Court does not have jurisdiction, for the reason that the United States Congress has conferred entire jurisdiction upon the Federal Courts or other tribunals, established by Congress, and that hence there is no right of recovery for any failure of duty in furnishing car facilities in the State Courts of which this is one. This contention, as you have noticed, we have overruled." (Transcript of Record, page 93.)

This portion of the Court's charge is embodied in the first specification of error.

Of course, if a State Court could take jurisdiction of any portion of the cause of action advanced by the defendant in error, the State Court in the present case had jurisdiction to pass upon and adjudicate the rights of the parties to the present controversy to the extent to which it had jurisdiction thereover, and the objections of the plaintiff in error to the jurisdiction to that extent would necessarily fail. The defendant in error has not, heretofore at least, asserted that the State Court could pass upon and adjudicate its right to cars which would have been used by it for interstate shipments. On the contrary, it has excluded from the case all cars which, according to its view, would have been so used. (See Exhibits embodying its claim between pages 70 and 71, Transcript of Record.) Its insistence heretofore has been and probably will continue to be that the jurisdiction of the State Court is not affected by the considerations to which we have adverted because the recovery in the present case has been limited to the damages resulting from the non-receipt of cars which would have been used, as claimed by the defendant in error, exclusively for intrastate shipments.

While we do not concede that this result would follow, even if it were true that the recovery was thus limited, any such contention on the part of the defendant in error is not justified by the facts of the case. We do not mean by this that the defendant in error has recovered in respect to cars which in the opinion of the trial Court and of the Supreme Court of Pennsylvania would have been used in or for interstate transportation because the recovery was restricted by the trial Court to those cars which it considered would have been used in intrastate transportation, but the Court, we submit, treated cars which under the evidence would have been used for interstate transportation as cars which would have been used for intrastate transportation.

The plaintiff in error presented a point or request for charge of the following character:—

“The plaintiff’s right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, to points inside the State of Pennsylvania, and there can be no recovery in this action for damages, if any, resulting from the plaintiff’s inability to sell coal f. o. b. cars at its mines consigned by it to points outside the State of Pennsylvania.” (Transcript of Record, page 101.)

The Court refused so to charge, and its refusal forms the basis for the fourth specification of error. The Court further instructed the jury that the plaintiff was entitled to recover in respect to all coal which in the period of the action the plaintiff would have mined and sold f. o. b. cars at its mines, upon the ground, as stated by it, that “where coal is sold f. o. b. cars at the mines it is a Pennsylvania delivery and the right of action is in the State Courts for failure of the common carrier to perform its common law or statutory duty.” The instructions to this effect form the basis of the second and third specifications of error.

The question raised by the three specifications of error above referred to has been so lately argued before this Court in the case of *Pennsylvania Railroad Company vs. Puritan Coal Mining Company*, that we do not feel justified in repeating what was said in the brief filed in that case on this point. We confess to an inability to understand the view upon which the trial Court acted and which has been approved by the Supreme Court of Pennsylvania that a car is not to be regarded as an instrumentality of interstate commerce which is loaded by a shipper with a shipment that he consigns to a point outside the State in which the shipment originated merely because the title to the lading passes from the shipper

to the consignee coincidentally with the completion of the loading.

The so-called "common law" obligation invoked by the defendant in error in the present case certainly does not require the carrier to furnish cars to one who simply desires to load them with some product of his mine or manufactory. The obligation, whatever it be, is to furnish cars for transportation, not for loading, and what we consequently are concerned with in the present case is whether the transportation service to which any additional cars would have been put by the defendant in error if they had been delivered to it would have made such cars vehicles of interstate or intrastate transportation, and if these cars had been delivered to the defendant in error for interstate shipments, if it elected to use them for this purpose, and had been loaded and consigned by it to points outside of the State, unquestionably it would seem that such cars could only properly be regarded as vehicles of interstate transportation.

It would not seem to be of the least significance that the interest of the defendant in error in the lading may have ceased before the actual transportation of the car from the mine commenced. The character of the car as an inter- or intrastate vehicle of transportation must be determined, we submit, solely with reference to the use made of it as a vehicle of transportation, and if the cars in question would have been used by direction of the defendant in error for the transportation of coal from its mines to points outside of the State of Pennsylvania, then this transportation use, we submit, would have necessarily constituted them vehicles of interstate and not intrastate transportation.

That the use or destination of the car was controlled by the defendant in error will hardly be disputed. The President of the Coal Company testified as follows in respect to the procedure that was followed as to cars delivered at its mines:

"The order (*i. e.*, shipping order) comes to the office at the mine and the mine superintendent gives

the shipping directions to the railroad official, the proper official, who sees that the coal is shipped to the proper party." (Transcript of Record, page 43.)

If, then, the destination of the shipment is the controlling factor in determining whether a car is an interstate or intrastate vehicle of transportation, and the power of a State Court does not extend to the adjudication of a controversy of the present character, in so far as it relates to cars which would have been consigned by the defendant in error to points outside the State of Pennsylvania, the judgment which has been rendered in favor of the defendant in error cannot be sustained.

But not only in respect to the cars which would have been used for interstate shipments, but as well in respect to all of the cars demanded by the defendant in error, the plaintiff in error, we submit, was subject to the provisions of the Interstate Commerce Act and to these alone, and the Court below was consequently without jurisdiction as to the cause of action as a whole asserted by the defendant in error.

The demands made were for cars generally, not for certain cars for interstate and certain cars for intrastate shipments. Every car, if delivered, could have been used for interstate shipments if the defendant in error had so elected. In respect to all of the cars, therefore, that were demanded, the defendant in error could have proceeded to obtain such redress for non-compliance with its demands as the Interstate Commerce Act permitted. But if the plaintiff in error in respect to these demands was subject to the Interstate Commerce Act, then it was subject to the provisions of that Act exclusively.

But, as a question identical in principle was involved in the Puritan Coal Company case above referred to, and as counsel for the plaintiff in error in this case have already presented their views thereon to this Court, we should not be justified in reiterating or repeating what was said in that case.

THE SO-CALLED "COMMON LAW" DUTY OR OBLIGATION RELIED UPON BY THE DEFENDANT IN ERROR, AS CONSTRUED AND ENFORCED BY THE SUPREME COURT OF PENNSYLVANIA, WOULD BE NOT MERELY A BURDEN UPON INTERSTATE COMMERCE, BUT A DIRECT INTERFERENCE THEREWITH.

Practically throughout the period of the action the plaintiff in error made a *pro rata* distribution of its coal cars among its shippers. Indeed one of the causes of action embraced in the defendant in error's declaration or statement of claim was the alleged failure of the plaintiff in error to give to it its *pro rata* share of the cars which were available for distribution. The allotment thus made was rendered necessary because the demands or requisitions of shippers for cars exceeded in the aggregate the number which the plaintiff in error had available.

To enable the plaintiff in error to make its allotment, the shippers were required to send in daily requisitions for cars, and the allotment made was based upon these requisitions, each shipper receiving a percentage of his requisition equal to the percentage which the cars available bore to the aggregate of all requisitions.

In order to assure the receipt of as many cars as possible, it was the rule or practice for the shippers to put in requisitions for cars equal to their mines' ratings, and this practice was followed by the defendant in error, as will appear from the second exhibit which will be found following page 70 of the Transcript of Record, and which is entitled "Plaintiff's Exhibit No. 33a." By referring to this exhibit, it will be seen that in one column there is given the "Rating for Month in Gross Tons as Fixed by Defendant," and in another column "Tonnage for which Requisition made, Gross Tons." While the aggregate of the figures embraced in the first column is not shown in the exhibit, it actually is 576,743 tons, and as the requisitions aggregate 552,255 tons, the latter amounted to between 95 per cent and 96 per cent. of the aggregate ratings.

In the same exhibit in the third column there is shown the "Actual Coal produced and shipped f. o. b. cars at mines

in Gross Tons," by the defendant in error, and while the aggregate of the figures in this column is not shown, it is 277,169 tons, or about 50 per cent. of the amount of tonnage covered by the requisitions made by the defendant in error.

While the defendant in error averred in its declaration or Statement of Claim that the cars which it had received had been less than its fair share of those distributed, any claim on this account was abandoned during the trial, and the recovery which the defendant in error has secured is based entirely upon the failure of the plaintiff in error to furnish all the cars for which the defendant in error asserted it made demands or requisitions.

As to the right of the defendant in error to recover because of non-compliance with these demands, the trial Judge charged the jury as follows:—

"It is further contended on the part of the defendant that the rule of law to which we have heretofore referred, which requires a common carrier in ordinary times and under ordinary conditions to have and furnish an adequate and sufficient supply of cars, does not mean that the common carrier is bound to furnish just the number of cars demanded or for which requisition is made by an individual shipper as was this plaintiff.

"It is contended in its behalf that the defendant, as a common carrier, had a sufficient and adequate supply of cars for ordinary times in the coal trade as a whole, but that because, taking the whole number of shippers in the region, the demand far exceeded the supply, and, as they infer, would exceed the necessities of the trade, they were obliged to, and in fact did, apportion or allot their coal cars according to a *pro rata* schedule based on the ratings of the several mines. With this contention we do not agree. The result of that contention, worked out to its logical conclusion, would lead to the undue and unreasonable discrimination expressly forbidden." (Transcript of Record, page 94.)

And in conformity with this view the following points or requests for charge presented by the plaintiff in error were refused.

"5. The plaintiff can in no event recover for an alleged shortage in the number of cars furnished it beyond what its *pro rata* share of cars would have been under the established system of distribution. (Transcript of Record, page 100.)

"12. The evidence does not disclose any general shortage of equipment on the part of the defendant, and accordingly the plaintiff cannot recover for the failure of the defendant to furnish cars in excess of the plaintiff's allotable share of the equipment of the defendant available for distribution under the defendant's system of distribution in effect during the period of the action." (Transcript of Record, page 100.)

It was found by the jury in the present action that the plaintiff in error had an adequate supply of cars for the needs of the coal business on its lines. We say this because the jury were instructed by the trial Judge that in order to find a verdict in favor of the defendant in error certain facts must be found by them which were thus stated by the Court in its charge:—

"Does the weight of the evidence convince you, first, that the plaintiff had a mine equipped and able to ship the coal which it claims it could have shipped; second, does the evidence satisfy you that the plaintiff company had a market or trade within the State of Pennsylvania for the coal which it claims it could have mined and sold at a profit; third, does the evidence show that it made requisitions upon the defendant company for cars and facilities for shipping coal up to its rating or somewhere near that rating; fourth, does the evidence show that the defendant company failed or refused to furnish the cars demanded, without legal or equitable excuse; fifth, does the evidence show that

the conditions of the bituminous coal trade were normal, and that the defendant company had a generally ample car supply for the needs of the coal business in normal times and under normal conditions? If you so find, then we say to you that the plaintiff has a right to recover in this action. * * *."

(Transcript of Record, page 95.)

As the jury found for the plaintiff, it must be accepted as an established fact that the defendant had during the period of the action, "a generally ample car supply for the needs of the coal business in normal times and under normal conditions."

But notwithstanding this adequate car supply the plaintiff in error was obliged by a condition for which it was in no sense responsible to make an allotment of its cars among its coal shippers. The condition which made this allotment necessary was that the aggregate capacity of the mines on the lines of the plaintiff in error was largely in excess of possible shipments therefrom, due to the fact that these mines could produce a far greater output than any available markets would take.

In the latter part of the period of the action the shipments from all mines averaged from 50 to 51 per cent. of their rated capacities. (Transcript, page 79.) And in the earlier part of the period the percentage had been still lower, indeed had not exceeded one-third of the physical or productive capacity. (Transcript of Record, page 82.)

The conditions which imposed upon the plaintiff in error the necessity of practically a continuous allotment and distribution in the period embraced in the action have been presented to the Interstate Commerce Commission in several cases, and the necessity and propriety of an allotment has been recognized by that body.

See Hillsdale Coal and Coke Company *v.s.* Pennsylvania Railroad Company, 19 I. C. C. Rep., 356. W. F. Jacoby & Company *v.s.* Pennsylvania Railroad Company; Clark Brothers Coal Mining Company *v.s.* Pennsylvania Railroad Company, 19 I. C. C. Rep., 302.

The condition, then, being such that an allotment was necessary, the obligation to make one was directly devolved upon the plaintiff in error by the Interstate Commerce Act, for it is of course settled beyond controversy that the general prohibitions contained in Section 3 of that Act against undue and unlawful discrimination apply to the allotment and distribution by a carrier of its available cars whenever an allotment thereof has to be made.

In the present case the plaintiff in error put in evidence the rules governing the allotment of its cars which had prevailed throughout the period of the action, and also a table showing the number of cars properly allottable to the defendant in error under these rules, the number delivered to it and the extent to which the deliveries were either over or under its allottable share in each month of the period embraced in the action.

These rules will be found on pages 76 and 77, and the table on page 85 of the Transcript of Record. By referring to this table it will be seen that there were monthly variations between the cars due to the defendant in error as its share of those allottable and those actually delivered to it. These variations were of course inevitable, but taking the period of the action as a whole the variations in favor of the plaintiff in error were in excess of those against it.

It was contended upon the trial that the rules governing the distribution brought about an unfair distribution, but this question of course ceased to be important because of the abandonment by the defendant in error of its claim based upon alleged unfair distribution and we have only referred to this feature of the case in order to direct the Court's attention to the fact that the defendant in error received the share of cars which it was entitled to during the period of the action under the rules which controlled the distribution. Even if these rules were open to criticism in respect to the method of allotment provided for therein, this fact would not of course tend to support the recovery which the defendant in error has secured because this was based not upon the non-receipt of its proper share of the cars distributed, but upon the non-receipt of all cars demanded.

Coming then to the question whether the demands made by the defendant in error imposed upon the plaintiff in error a duty to comply therewith we have first to consider whether compliance with these demands or with its duty to make a *pro rata* allotment of its cars among all its shippers was the primary and paramount duty of the plaintiff in error, for it is indisputable that if the demands had been complied with and the cars covered by them had been delivered the plaintiff in error would have violated not only the rules of distribution which it had in force, but any possible variation thereof which has ever been suggested in connection with rules for allotment and distribution of cars.

But both the trial Court and the Supreme Court of Pennsylvania have held that without regard to the effect upon the distribution of its equipment the plaintiff in error failed in the performance of its duty because it did not deliver all of the cars thus demanded by the defendant in error.

As thus construed the so-called "common law" obligation enforced by the Supreme Court of Pennsylvania is not merely a burden upon interstate commerce, but is a direct interference with such commerce, for compliance therewith necessarily involves a disregard of a duty imposed by the Interstate Commerce Act, that duty being not to prefer shippers in the distribution of equipment when the demands of all cannot be complied with.

The interference is more direct and more far-reaching than that which was found by this Court in the case of the Yazoo & Mississippi Valley Railroad Company *vs.* Greenwood Grocery Company, 227 U. S., 1, to render invalid a rule or regulation of a State Railroad Commission made pursuant to authority conferred upon it by the State. The regulation in that case, which was condemned because it imposed an undue burden upon interstate commerce, imposed penalties upon railroad companies which failed to deliver cars within a certain given period after arrival at destination and it was sought to be applied in a case in which certain cars loaded with interstate shipments had not been delivered within the specified time. The penalties which

were claimed because of such non-delivery had accrued both before and after the date of the passage of the Hepburn amendment. As to those which had accrued after the passage of that Act it was held that the state regulation was inoperative under the decision in the Hardwick Farmers' Elevator Company case and to those which had accrued before its enactment, that the duty sought to be imposed by the regulation amounted to an unreasonable burden upon interstate commerce because, to quote from the opinion of Mr. Chief Justice White, "the requirement as to the delivery of cars within the short period fixed by the rule is absolute and makes no allowance whatever for any justifiable and unavoidable cause for the failure to deliver."

In the case to which we have just referred the regulation which was condemned by this Court did no more than impose a burden upon the carriers subject thereto; it did not amount to an attempt upon the part of the State to interfere with any method of dealing with equipment which had been devolved upon carriers by the Interstate Commerce Act or to secure for the shippers of the State under whose authority the regulation had been promulgated any advantage over interstate or other shippers.

In the present case the obligation which the Supreme Court of Pennsylvania has enforced against the plaintiff in error goes far beyond the regulation which was involved in the case to which we have just referred, because compliance with this obligation as defined by the Supreme Court of Pennsylvania necessarily involves non-compliance with the requirement of the Interstate Commerce Act that a carrier must make a ratably equal distribution of its equipment among all shippers when unable to comply with the demands of all.

The Supreme Court of Pennsylvania has treated the duty which in its judgment was devolved upon the plaintiff in error because of the existence of the common law obligation which it enforced as the paramount duty, and the duty to allot and distribute which has been imposed by the Interstate Commerce Act as the subordinate one, a clear reversal, we submit, of the rule of law which has been so often

enunciated by this Court that action by Congress within the sphere of its powers is paramount and controlling as against opposing or conflicting state or common law enactments or requirements.

The situation that confronted the plaintiff in error was this: It had cars sufficient to enable it to transport the total volume of shipments which would probably be offered to it by the operators on its lines. In other words, as found by the jury, it had "an ample car supply for the needs of the coal business" on its lines. The mines on its lines had, however, both an actual and a rated productive capacity which in the aggregate largely exceeded the car capacity of the plaintiff in error.

If every operator, therefore, ordered cars up to his mines' rating (and this was what was done as a rule) the plaintiff in error would be unable to furnish all the cars demanded. It could not lawfully furnish to one shipper all demanded by him, nor was it in a position to determine which of the operators could and which could not use all of the cars ordered, and consequently could not revise the orders with the view of bringing them down to the actual requirements of each shipper and thus keeping the aggregate within the limits of the aggregate shipments and the available car supply.

It was obligatory, therefore, that some system of distribution should be established which would give the necessary consideration to the elements or factors which should be given consideration in determining the apportionment to be made of its cars in order that each shipper should secure the proportion thereof which would most nearly represent the proportion of the aggregate shipments which such shipper was in a position to make.

With this object in view all of the mines shipping over the plaintiff in error's railroad had been rated for the purpose of ascertaining the percentage of the cars available for distribution which each should receive, this rating being based in part upon physical productive capacity of the mine and in part upon its shipping capacity. By treating the physical productive capacity of the mines as an element or factor in

determining the distribution, the plaintiff in error was necessarily required to make an apportionment of its cars more or less arbitrary, but in so doing it was conforming to a system which has been upheld by the Interstate Commerce Commission and which gave less consideration to the physical productive capacity than has been claimed should have been accorded to this feature by counsel among others, who represent the defendant in error in this action, and who in the case of the Hillsdale Coal and Coke Company vs. Pennsylvania Railroad Company, 19 I. C. C. Rep., 356, strongly contended that the physical productive capacity of the mines should be the sole determining factor in the ascertainment of their ratings.

Referring to the attitude of the Coal Company in that case the Interstate Commerce Commission said:—

“But in this petition the Complainant, as we understand its attitude, demands that the commercial capacity of the mines served by the defendant shall be eliminated as a factor in fixing their rating, and that their physical capacity shall be accepted as the sole factor for determining their respective proportions in the distribution of coal cars.”

It was the inclusion as a factor of the physical productive capacity that produced mine ratings so largely in excess of the shipments and which consequently made a percentage allotment of its cars by the plaintiff in error a necessity. If the factor of physical capacity had been alone used, the ratings would of course have been increased and the disparity between the ratings and the shipments would have been likewise increased, and whatever was arbitrary in the system of distribution to which the plaintiff in error was conforming in the sense that productive capacity rather than ability to market the output was accepted as determining the car allotment, would only have been accentuated.

The defendant in error did not claim that the other shippers were being supplied with all the cars demanded by them. On the contrary its president testified that “Most

of the other operators mining this kind of coal were getting no "the cars they needed, but a great deal more cars than we " (Transcript, page 54), and it was recognized and indeed admitted by him that compliance with the demands made by his company would have worked to the disadvantage of other shippers, but as a justification for the inequality of distribution which would have resulted, he advanced this view:—

"A great many shippers of coal would have waited until our orders were placed, because we had the best grade of coal, and it was always taken up." (Transcript of Record, page 53.)

If it were true that the coal which the defendant in error was mining was of such superior character that it would command the market as against its competitors, and if this were a consideration which the plaintiff in error could take into account in determining the allotment of its cars among shippers, it would seem that the only way in which the defendant in error could have secured the preferential treatment which its president considered the quality of its coal justified, would have been through some preferential rating of its mine or preferential rule of distribution which would bring about the desired result. Clearly it would seem that under the ratings that existed and under the system of distribution in force the plaintiff in error was debarred from picking out any one or more mines as entitled to special consideration or treatment in the distribution of cars because of the quality of their coal or for some other consideration. And if the defendant in error thought that special consideration was due to it, its remedy was to bring to the attention of the Interstate Commerce Commission the facts upon which it relied as justification therefor and secure from that body an order or direction which would require the plaintiff in error to so adjust its ratings and methods of distribution as to secure to the defendant in error the advantage over its competitors which it claimed the superior character of its coal entitled it to.

It may have been the case that cars in excess of its quota or share which were not delivered to the defendant in error, but were delivered to another shipper as part of the latter's quota, would have been utilized for coal orders or sales which would have been secured by the defendant in error if both had had cars available therefor. But even assuming that this was or should have been known to the plaintiff in error, the defendant in error would not, we submit, have been justified in withholding from the other shipper any of the cars to which he was entitled under the rules of distribution which had been put in force by it. And yet because it did not do this, the plaintiff in error has been mulcted in damages in the present case.

Surely the so-called "common law" obligation is not of such a fixed and formidable character as the Supreme Court of Pennsylvania has held it to be in the present case. It was not so held by this Court in the case of *Interstate Commerce Commission vs. Illinois Central Railroad Company*, 215 U. S., 452, where this Court, speaking by Mr. Chief Justice White, said in respect to the extent of the carrier's duty which we are considering:—

"Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demands for the transportation of coal takes place, because, among other things, a, of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; b, *the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads* consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and c, because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after

arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points." (Page 460.)

Here is an express recognition that the duty of carriers to comply with shippers' demands for cars is subject to certain limitations, and can it be doubted that one of these is that such demands in times of allotment must not be in excess of the fair share of the cars available for distribution?

But in treating the duty which we are discussing as a fixed and absolute one, the Supreme Court of Pennsylvania disregarded a further qualification or limitation which has been clearly established by the decisions of this Court.

Upon the trial an offer was made upon behalf of the plaintiff in error to prove "that during all of the period of this action the defendant had in effect on and for shipments of bituminous coal through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant, and these cars, if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive." (Transcript of Record, page 79.)

Upon objection by the defendant in error this evidence was excluded, and the action of the trial Court in this respect was sustained by the Supreme Court of Pennsylvania.

It must be assumed, of course, that the testimony, if admitted, would have established the facts referred to in the offer. The question, therefore, necessarily presented is, to what extent, if any, the facts which would have been established, had the testimony been admitted, would have constituted a defense to the present action.

The issue that would then have been presented would have been substantially this: Is a carrier which is subject to the obligations imposed by the Interstate Commerce Acts, and which is possessed of an adequate car equipment to meet the demands of its shippers, relieved from liability to one of its shippers, either entirely or *pro tanto*, because of its inability to furnish him with all the cars desired, when this inability results either entirely or to some extent from the fact that part of its equipment is off its lines and consequently unavailable to it, due to the fact that in the conduct of its interstate business it has been obliged to allow its cars to go off its own lines and onto the lines of other carriers?

Unless we have misapprehended the effect of some decisions of this Court, there can be but one answer to this question. In *St. Louis Southwestern Railway Company vs. The State of Arkansas*, 217 U. S., 136, it appeared that the railway company had an equipment of cars adequate for the needs of its shippers under ordinary circumstances and conditions. It had been unable, however, due to the fact that a large number of its cars were on the lines of its connections, to furnish cars to a shipper who had demanded them, and this refusal had led to a proceeding to enforce the penalty imposed by a statute of Arkansas upon railroad companies which failed upon demand to furnish cars to shippers.

The railway company defended upon the ground that it was obliged to allow its cars to go off its lines because of the obligations to which it was subject under the Inter-

state Commerce law, and that the enforcement of the penalties against it prescribed by the statute because it was unable, due to its compliance with this obligation, to furnish the cars demanded, would be tantamount to holding that the obligations imposed by the State statute were paramount to those imposed by the Interstate Commerce Act. This contention was not sustained by the Courts of the State of Arkansas, but was sustained by this Court, and a judgment against the railway company was reversed because, in the opinion of this Court, "the ruling of the Court below involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the Company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right."

In *Hampton v. St. Louis, &c., Ry. Co.*, 227 U. S., 456, the same Arkansas statute which was before the Court in the case in 217 U. S., was involved. The plaintiff in the case, the Railway Company, sought an injunction to restrain the bringing of actions under the statute to recover the penalties prescribed thereby. The Circuit Court of the United States, in which the action had been brought had granted the injunction, and while its judgment was reversed by this Court upon the ground that an injunction against the attempted enforcement of the Act was not justified because the objections to the statute upon which the Railway Company relied could be availed of in proceedings brought to recover penalties, and that consequently the intervention of a court of equity was not justified, it was made very clear that the Court did not intend to recede from the views expressed in 217 U. S., for in the opinion it was plainly indicated what would be the result if the statute should be given a construction which would make the carrier's duty to deliver cars upon demand an absolute one.

The statute was not condemned solely because the Court regarded certain decisions of the Arkansas Courts as having put a construction upon it which relieved it from the criticisms of the Railroad Company, and it was pointed out

that if the limitations which had been engrafted by these decisions were to be ignored, relief from the statute could be secured through this Court.

"The cases referred to," said Mr. Justice Lurton, delivering the opinion of the Court, "make it clear that the statutory duty of furnishing cars upon the reasonable notice of a shipper is not absolute, and that the Legislature did not intend to impose upon railroad companies the duty of furnishing cars to a particular shipper regardless of its equal duty to other shippers, State and interstate, or to a situation due to some unusual and unavoidable condition which made it unreasonable that it should be penalized for non-compliance; and also that if in the administration of the statute a ruling is made by the State Court in respect to an excuse for non-compliance which operates as a restraint upon interstate commerce, a Federal question arises which may be reviewed by this Court."

And in *Interstate Commerce Commission v. Illinois Central Railroad Co.* (*supra*) the absence of cars which had been "delivered by a carrier beyond its own line for transportation over other roads" was regarded as qualifying the duty that a carrier was under as to furnishing cars to shippers.

In the present case the Supreme Court of Pennsylvania has through its construction of what it designated as a "common law" obligation held the plaintiff in error liable for failure to furnish cars to a particular shipper "regardless of its equal duty to other shippers, State and interstate," and also regardless of the fact that its inability to furnish such cars was partially and indeed largely due to compliance with the obligation that it was under to allow its cars to go off its lines when so consigned by shippers, and as a consequence the plaintiff in error would seem to be entitled to the same measure of relief from this Court as it was so plainly intimated would be accorded to railroad companies upon whom burdens of the same character should be imposed if the Arkansas statute which was involved in the two cases above referred to were to be treated as imposing the same absolute and rigid duty which has been enforced against the plaintiff in error in the present case.

NO DEMAND MADE BY DEFENDANT IN ERROR FOR ANY OTHER CARS THAN THOSE TO WHICH IT WAS ENTITLED UNDER THE SYSTEM OF DISTRIBUTION PURSUED BY THE PLAINTIFF IN ERROR.

It will hardly be denied that before the plaintiff in error could be held to be in default for failure to deliver cars, reasonable demand therefor must have been made.

The evidence in the present case not only fails to show that any demand was ever made by the defendant in error for any cars other than those to which it was entitled under the system of distribution which was being pursued, but affirmatively establishes that the only orders or requisitions for cars which the defendant in error ever made were those which it made upon the officers of the Railroad Company who were charged with the distribution of its available cars.

Frank H. Palmer, who was superintendent of the defendant in error's mine testified as to the orders given for cars as follows:—

"By MR. LIVERIGHT:

"Q. Did you order cars while you were there, put in requisitions to the Railroad Company?

"A. Every day over the 'phone.

"Q. To whom did you make requisition?

"A. We would just call up Mr. Clark's office.

"Q. Who was Mr. Clark?

"A. He was a car distributor.

"Q. At Altoona?

"A. Yes, sir.

"Q. Was that the point from which distribution was made for Sonman mine?

"A. Yes, sir." (Transcript of Record, page 156.)

It is apparent, therefore, that while the defendant in error was sending in requisitions or orders for cars, these were sent in by it solely for the purpose of enabling the plaintiff in error to distribute those which it had available for distribution. These orders or requisitions, therefore, were

not in reality for the cars which were covered thereby, but were for whatever proportion of the allotable or distributable cars the defendant in error was entitled to, considered with reference to the number embraced in its order or requisition and the number embraced in the orders or requisitions made by all the shippers who were entitled to share with the defendant in error in the distribution of the available cars, and there is nothing in the testimony to indicate that the plaintiff in error was ever advised that the defendant in error desired or claimed to be entitled to any greater number of cars than its share of those which were available for distribution. Witnesses upon the part of the defendant in error testified to interviews had with certain officers of the plaintiff in error, and certain letters written to its officers on behalf of the defendant in error were put in evidence, but in all of these interviews and in all of these letters the complaints were, not that the defendant in error was not receiving the cars for which it had made requisitions, but that it was not receiving its fair share of the cars which were being distributed. So that throughout the period of the action, so far as the evidence discloses, the defendant in error neither made demand for the cars which it now claims ought to have been delivered to it, nor made any representations or complaints which had any reference to the failure of the plaintiff in error to furnish such cars. All the complaints related to the failure of the plaintiff in error to give to it its allotable share of those which were available for distribution among its shippers, or to the alleged unfairness of the system of distribution itself.

Before the plaintiff in error should be held responsible for failure to deliver cars, it must appear that demand for the same had been made upon it, and as the evidence in the present case not only fails to show, but is inconsistent with, any such demands, the defendant in error's proof lacked an element which was essential to a recovery.

FRANCIS I. GOWEN,
F. D. McKENNEY,
JOHN G. JOHNSON,

For Plaintiff in Error.





Office Supreme Court, U. S.

FILED

MAR 16 1914

JAMES D. MAHER

CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO. 272 OCTOBER TERM 1913.

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10

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

VS.

**THE SONMAN SHAFT COAL MINING COM-
PANY,**

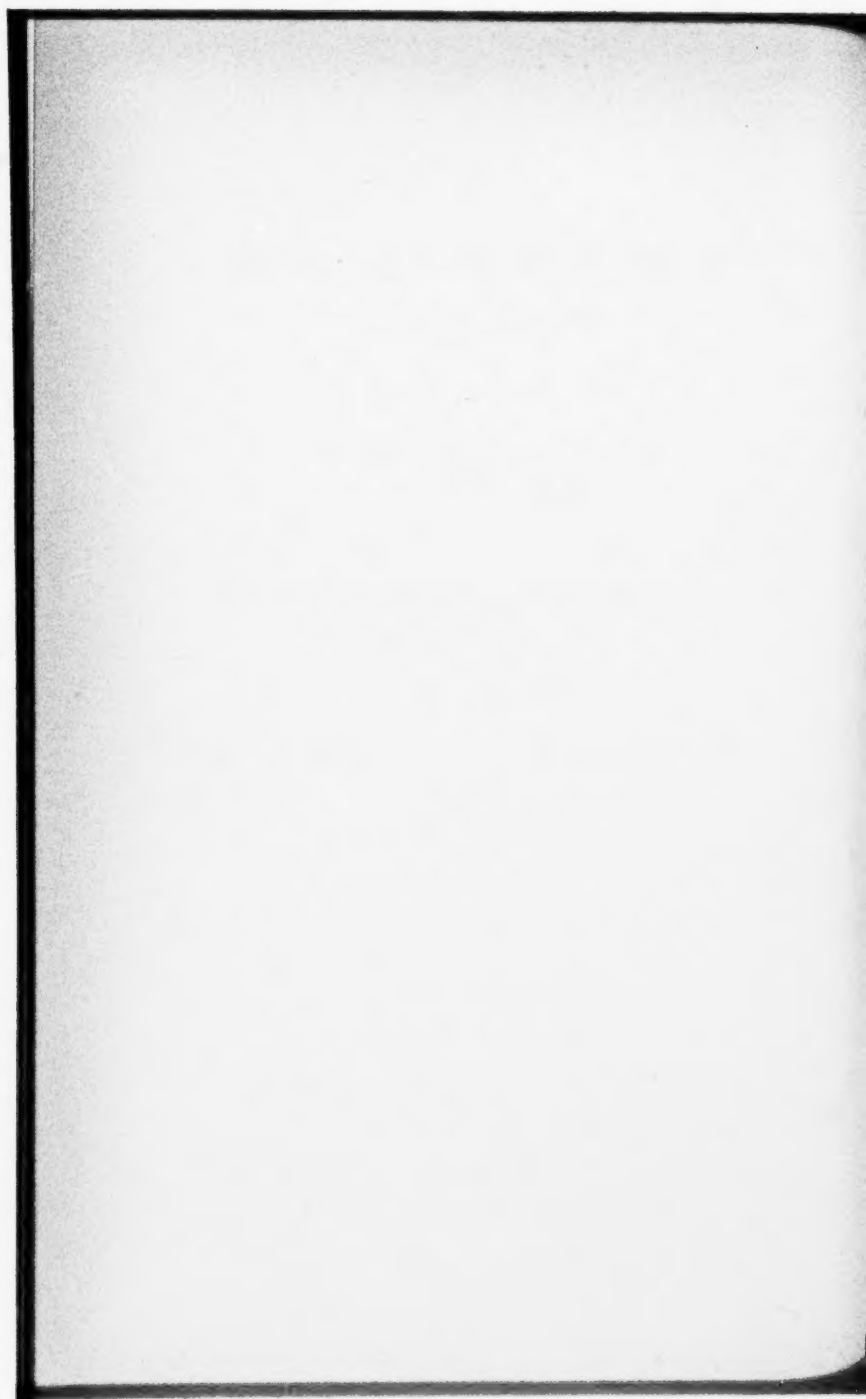
DEFENDANT IN ERROR

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

A. M. LIVERIGHT,

A. L. COLE,

Counsel for Deft. in Error.



**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO. 772, OCTOBER TERM 1913.

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

VS.

**THE SONMAN SHAFT COAL MINING COM-
PANY,
DEFENDANT IN ERROR**

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

A. M. LIVERIGHT,

A. L. COLE,

Counsel for Deft. in Error.

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**IN THE SUPREME COURT OF THE UNITED
STATES.**

**The Pennsylvania Rail-
road Company plain-
tiff in error
versus**

**The Sonman Shaft Coal
Company, defendant in
error.**

No. 772 October Term 1913

Comes now the said defendant in error by A. M. Liveright and A. L. Cole, its counsel and suggests diminution of record in this case, to-wit: That certain evidence of record in the Supreme Court of Pennsylvania is omitted from the transcript on file in this court, that said evidence is indicated as follows:

(1). Excerpt from the testimony of E. P. Saxman, beginning at page 4a and continuing to the word "It is between the mine and Johnstown." at the third line from the top of page 10a in Exhibit, "A" attached to praecipe of plaintiff in error.

(2.) Testimony of J. M. Cameron, pages 62a to 68a of said Exhibit.

(3), Testimony of Vance C. McCormick, pages 68a to 96a inclusive, of said Exhibit.

(4.) Excerpt from the testimony of James Stran, beginning with the words "How many empties could be placed above the tipple, to be dropped under the tipple for loading purposes?" at line 3 page 111a to the words "Noon recess" on page 113a of said Exhibit.

(5.) Excerpt from the testimony of James B. Neale, beginning at page 144a with the words "What connection have you had with the Sonman Shaft Coal Company" to and including the words "By the general shortage "at line 19 page 145a of said Exhibit.

Excerpt from the testimony of same witness, beginning "By Mr. Liveright" page 152a and continuing to the end of that page.

(6). Excerpt from the testimony of J. A. Jardene, page 159a of said exhibit, as follows:

"Q. What do you say was the condition of the market as to the demand for bituminous coal in the years from April 1st, 1903 to April 1st, 1907, was it normal or abnormal?

A. There was nothing abnormal about the business during any of that time. We were actively engaged in buying and selling coal, besides mining coal, so I am well acquainted with the conditions."

(7.) Excerpt from the testimony of John W. Rockwell, page 172a of said exhibit, as follows:

"Q. In the period I have mentioned 1903 to 1907, what do you say was the condition of the market

for demand for coal, was it normal or otherwise?

A. It was normal."

(8.) Excerpt from the testimony of James VanPelt, page 175a of said Exhibit as follows:

"Q. What was the condition of the market in relation to the demand for coal in the period from 1903 to 1907, that is to say, was it normal or otherwise?

A. I considered it to be about normal."

(9.) Excerpt from the testimony of Frank H. Palmer, beginning at page 194a, and continuing to the words, "Yes-sir" on the third line of page 196a of said Exhibit.

(10) Excerpt from the testimony of M. Trump, beginning with the question on page 233a, "I show you papers marked Plaintiff's Exhibit from 21 to 30 inclusive, and I ask you what they are in a general way, whether they are orders for the distribution of cars or what they are?" to and including the answer "I think so, yes" at the fourth line from the foot of page 238a of said Exhibit.

(11. Excerpt from the testimony of H. L. Spottswood, beginning at page 243a to the words "I will get you the papers you want" at the fifth line from the foot of page 244a of said exhibit.

(12.) Testimony of E. F. Saxman, page 269a and 270a of said Exhibit.

(13.) Testimony of H. L. Spottswood, page 314a to 317a inclusive of same Exhibit.

(14. Excerpt from the testimony of Vance McCormick, beginning with question at foot of page 329a to the end of the question terminating with the words "After that" on line 11, page 330a of said Exhibit.

(15.) Excerpt from the testimony of G. W. Creighton, beginning with the words "During the time of this action" near the top of page 403a and extending to and including the word "Yes" at the seventh line from the foot of the same page in said exhibit.

(16) Excerpt from the testimony of J. W. Manley, beginning at the top of page 408a and continuing to the end of his testimony on the same page of said exhibit.

(17.) Plaintiff's Exhibit No. 43 at page 432a of said exhibit "A".

(18). Plaintiff's points numbers 1, 2, 3, 5, 7 and 8, and the answers thereto at pages 26, 27, 28 and 29 of Exhibit "B" attached to the praecipe of the plaintiff in error.

(19.) Defendant's points 3 and 4 at page 31 of said Exhibit "B" of Plaintiff in error.

(20.) History of the case at pages 3, 4 and 5 of Exhibit "C" hereto attached and made a part of the praecipe of the defendant in error.

That by inadvertence on the part of the defendants in error's attorneys and by a misunderstanding of the rules of this court they were under the impression that they had ninety days from the time of service of the plaintiffs in errors praecipe on them, designating

the part of the record to be sent up within which to file their counter praecipe, believing that the proceeding was under rule 9 section 10, and thereby allowed the ten days to expire in which they should have filed their counter praecipe under section 1 of rule 8 of the Rules of Practice of this court.

That immediately upon discovering their mistake the defendants in error applied to a Justice of the Supreme Court of Pennsylvania, for an enlargement of the time in which to file their counter praecipe, which application was granted by the Honorable John P. Elkin, Justice of said Court as appears by schedule hereby attached, setting forth the order of said justice.

That defendants in error's attorneys are now advised that said order is not effective to make the transcript so returned a part of the record of this court.

That the parts of the record so omitted are material and absolutely essential to the proper understanding and decision of this cause.

WHEREFORE, the said defendant in error moves the court under rule 14 to award a writ of certiorari to be issued and directed to the Judges of the Supreme Court of Pennsylvania, commanding them that searching the record and proceedings in said cause they forthwith certify to this court those parts of said record so omitted as aforesaid.

A. M. LIVERIGHT,
A. L. COLE,

CLEARFIELD COUNTY, ss.

Personally came before me the subscriber, A. L. Cole and A. M. Liveright, attorneys for the defendant in error, who being duly sworn, say that the facts set forth in the foregoing motion are true:

Sworn and subscribed

this day of March 1914.

J. M. BRYAN,

Justice of the Peace.

EXHIBIT "A"

**IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT**

Sonman Shaft Coal Com-
pany,

vs.

Pennsylvania Railroad
Company

Appellant.

January Term, 1913.

No. 30.

To the Honorable John P. Enkin, Justice of the Supreme Court of Pennsylvania.

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Sonman Shaft Coal com-

pany, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad company, on September 23, 1913, served a copy of the praecipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter praecipe of the defendant in error; that by inadvertance, Counsel for the defendant in error failed within 10 days of service upon them of the praecipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter praecipt.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter praecipe may be enlarged by the Judge of the Court whose decision is made the subject of review, or by a Justice of the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They herefore respectfully pray your Honor now to make an order enlarging the time for filing their praecipe until the 6th day of December, 1913.

And they will ever pray.

(Signed).

A. M. LIVERIGHT,
A. L. COLE.

State of Pennsylvania

ss.

County of Clearfield.

A. M. Liveright, one of the petitioners being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

(Signed) A. M. LIVERIGHT.

Subscribed and sworn to before me this 15th day of November, 1913.

JAMES K. HORTON,
Notary Public.


EXHIBIT "B".

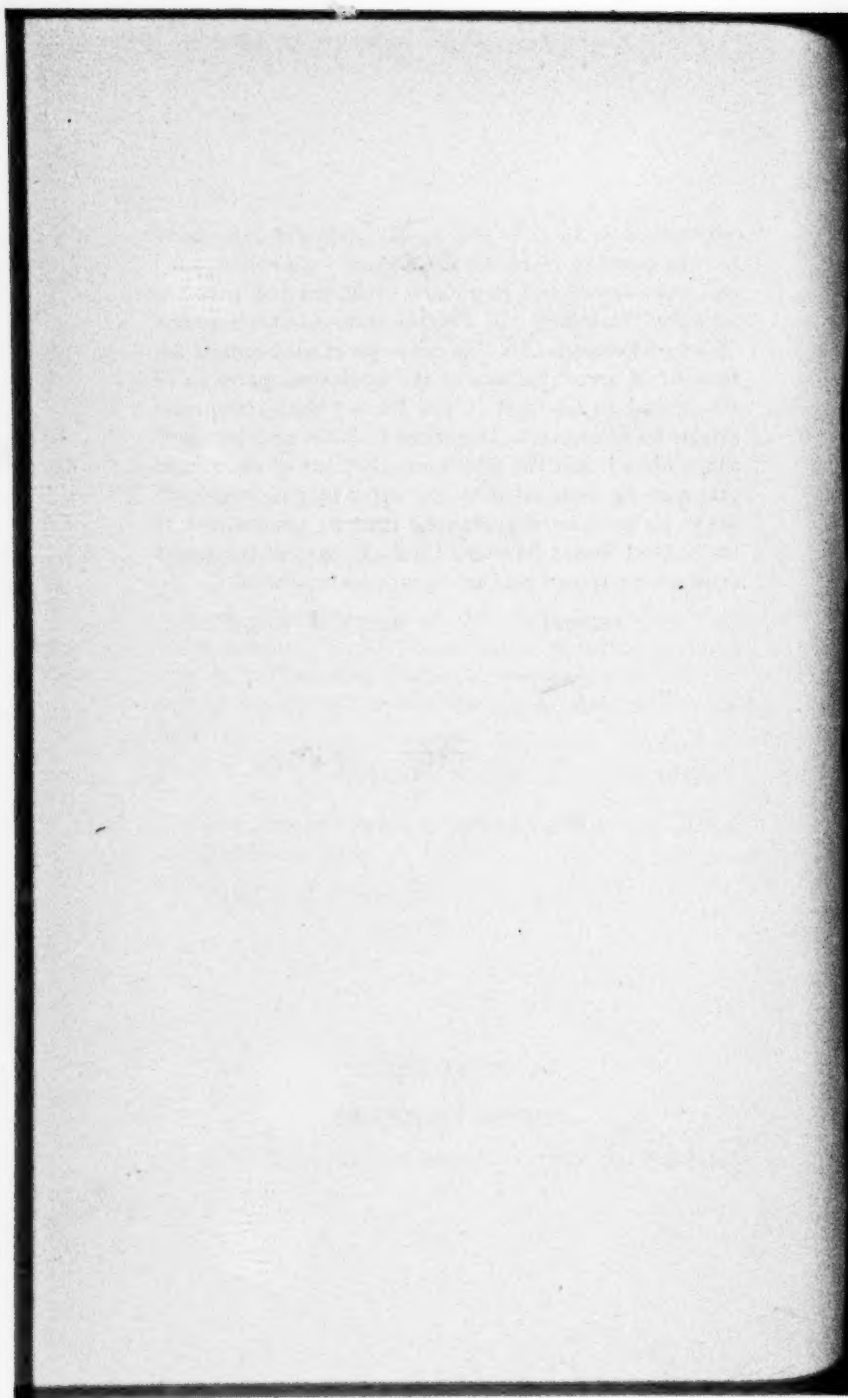
ORDER OF COURT

day of November, 1913, the foregoing

petition of A. L. Cole and A. M. Liveright, Attorneys for the Sonman Shaft Coal Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the praecipe of said named defendant in error, indicating the additional portions of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as part of the transcript of the record and be therein incorporated.

(Signed).

JOHN  ELKIN.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 772.

**THE PENNSYLVANIA RAILROAD COM-
PANY, PLAINTIFF IN ERROR,**

vs.

THE SONMAN SHAFT COAL COMPANY.

No. 773.

SAME

vs.

STINEMAN COAL MINING COMPANY.

No. 774.

SAME

vs.

**CLARK BROTHERS COAL MINING
COMPANY.**

WRITS OF ERROR TO THE SUPREME COURT OF
PENNSYLVANIA.

**STATEMENT ON BEHALF OF THE PENNSYLVANIA
RAILROAD COMPANY IN OPPOSITION TO MOTIONS
FOR CERTIORARI.**

In each of the above cases the defendants in error have suggested diminution of the respective transcripts of record and moved the court for writs

of certiorari under rule 14 of the Rules of Practice of this court.

In each of these cases the final judgment of the State Supreme Court was entered June 27, 1913, and the respective writs of error were sued out and perfected July 1, 1913. Immediately thereafter the time for filing the writ of error in this court was extended by appropriate order until October 15, 1913.

In each case a copy of plaintiff in error's specifications of error and a copy of its præcipe to the prothonotary of the State Supreme Court designating the portions of the record to be included in making up the transcripts of the records for this court was served September 23, 1913, on Alfred M. Liveright, Esq., one of the attorneys of record in that court for the respective defendants in error here, and the originals, with due proof of such service, were filed with such prothonotary.

The introductory paragraph of such præcipe in each case is as follows, viz:

"To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

"Pursuant to section 1 of rule 8 of the Rules of Practice of the Supreme Court of the United States, you are respectfully requested to incorporate into the transcript of the record to be certified to the Supreme Court of the United States, and there filed

in connection with the writ of error heretofore sued out from the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above-entitled case, the following portions of the record" (201).

In none of the cases did counsel for the various defendants in error designate any additional portions of the record which he desired to have incorporated in the transcript, as he might have done under said paragraph 1 of rule 8, nor did he make any application for an enlargement of the time within which to file such designation except as hereinafter stated. On the — day of October, 1913, the prothonotary of the State Supreme Court, in conformity with the third section of said paragraph 1 of rule 8, reading as follows:

"The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided."

returned to this court transcripts of records made up in accord with the præcipes filed on behalf of the plaintiff in error, and same were duly docketed in this court on the 30th day of October, 1913. Thereafter, on the 15th day of November, 1913, counsel for the respective defendants in error, without notice to counsel for plaintiff in error, applied to a justice of the Supreme Court of Pennsylvania to enlarge until December 6, 1913, the

time already expired within which to file præcipe, designating additional portions of the record to be included in the transcripts of the records then already docketed in this court. An order to such effect appears to have been signed by the learned justice applied to (Motion Paper, p. 10), who also—

“further ordered that the additional portions of the record that may be designated by the defendants in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as part of the transcript of the record and be therein incorporated.”

Having come to realize the utter futility of such order, counsel for defendants in error now suggest diminution of the several records and move for writs of certiorari under the 14th rule of the Rules of Practice of this court, asserting as ground why such favor should be extended to them:

“That by inadvertence * * * and by a misunderstanding of the rules of this court they were under the impression that they had ninety days from the time of service of the plaintiff in error’s præcipe on them, designating the part of the record to be sent up within which to file their counter-præcipe, believing that the proceeding was under rule 9, section 10 (evidently section 9 of rule 10 is here meant to be referred to) and thereby allowed the ten days to expire in which they should have filed their counter-præcipe under section 1 of rule 8 of the Rules of Practice of this court.”

It must be apparent that the so-called "inadvertence" or "misunderstanding" on the part of defendants in error's counsel was nothing more than plain carelessness or inattention, for the simple perusal of the præcipes filed for the plaintiff in error would have caused them to know that the "proceeding" was being had under and in conformity with section 1 of rule 8, while a like perusal of section 9 of rule 10 of this court, under which (as incorrectly cited) it is said they believed they were proceeding, would have quickly apprised them of the fact that all of the provisions of rule 10 apply only to records which have actually reached this court, or at least its clerk's office.

It would seem that favorable action upon these motions would but result in nullifying *pro tanto* the applicable provisions of rule 8, which, as declared by the rule itself, were promulgated not only "to enable the clerk (below) to perform such (his) duty," but also "for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed."

In order to enforce respect for and compliance with the Rules of Practice which have been promulgated for the guidance of all litigants having business at this bar, it is respectfully submitted that the motions for certiorari severally should be denied.

If, however, the court in its wisdom should be of opinion that the litigant should not be required to bear the consequences of the "inadvertence" and "misunderstanding" of counsel, then it is likewise respectfully submitted that the granting of the motions should be coupled with the requirement that in each instance the defendants in error at the time of lodging the returns to the respective writs of certiorari in this court shall deposit with the clerk the full amount of the estimated clerk's costs and expense of printing properly attributable thereto in order that the plaintiff in error, which has scrupulously complied with the law and the Rules of Practice, may not be even primarily burdened thereby.

FRANCIS I. GOWEN,
FREDERIC D. MCKENNEY,
*Attorneys for the Pennsylvania
Railroad Company.*



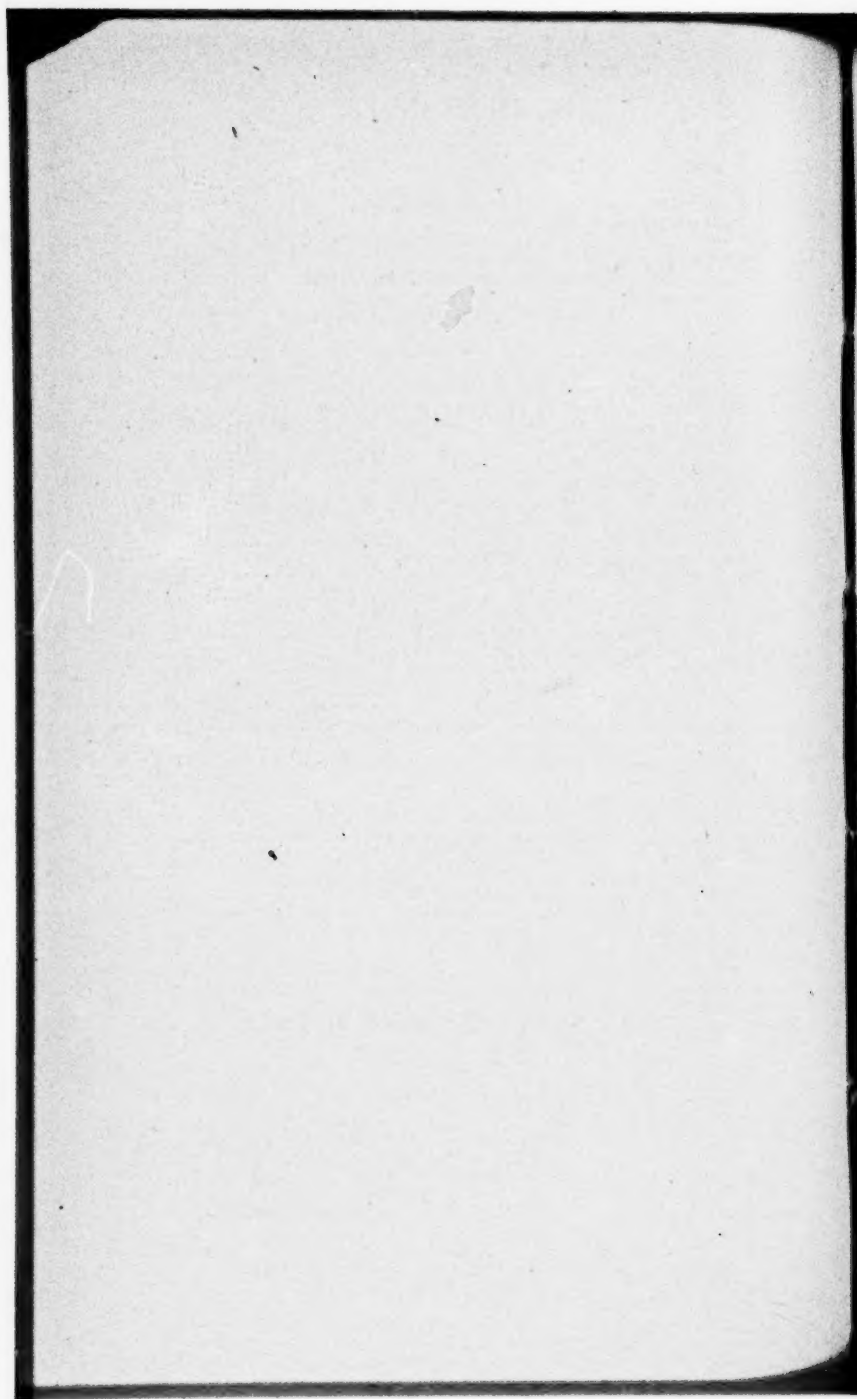


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No. 288.

OCTOBER TERM, 1914.

IN THE

Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,

PLAINTIFF IN ERROR,

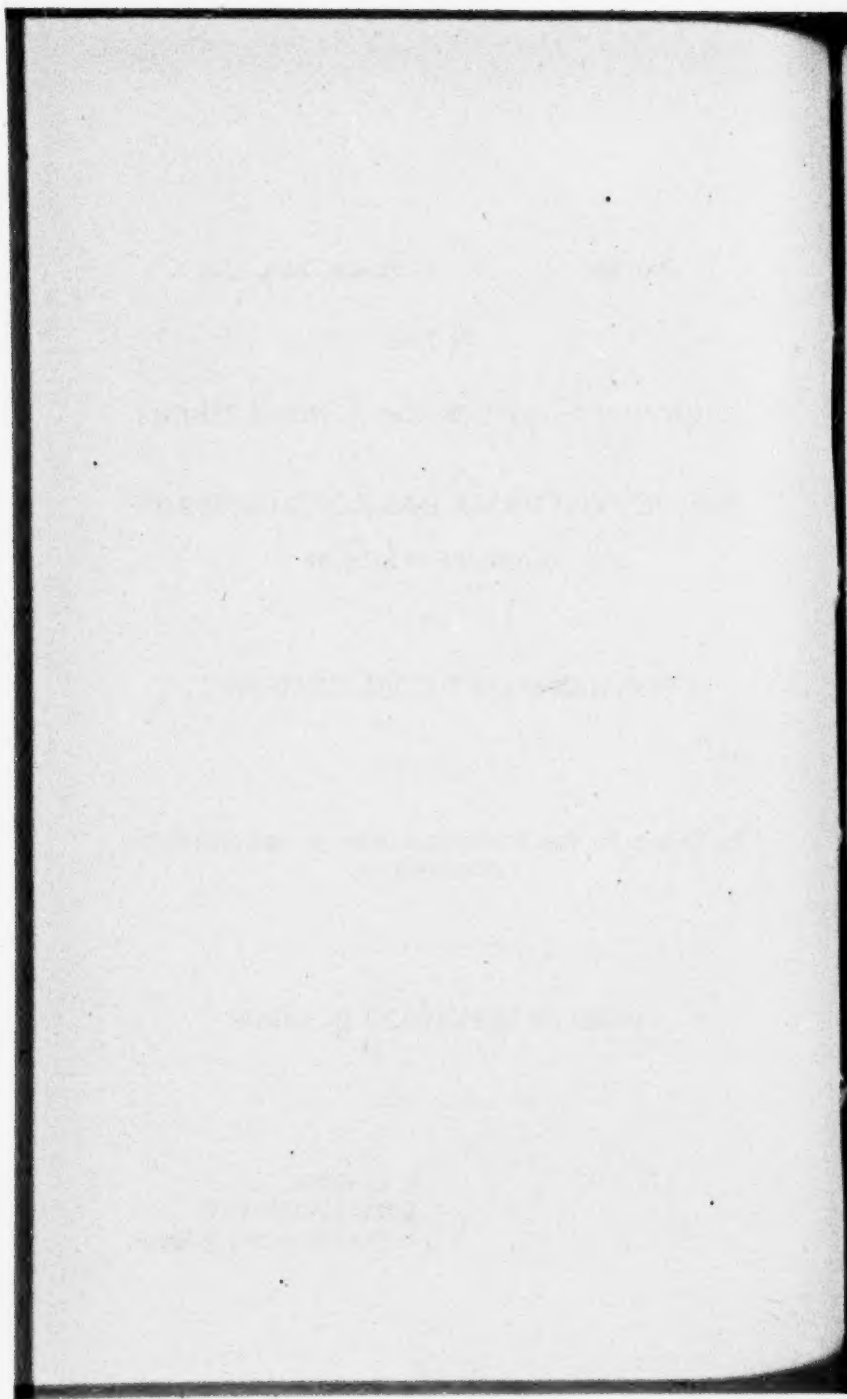
vs.

SONMAN SHAFT COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

A. L. COLE,
A. M. LIVERIGHT,
For Defendant in Error.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914. No. 288.

The Pennsylvania Railroad Company, Plaintiff in Error

vs.

Sonman Shaft Coal Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

COUNTER-STATEMENT OF THE CASE.

From 1903 to 1907, defendant-in-error, the Sonman Shaft Coal Company, was engaged in mining coal on the Mountain Division of the Pennsylvania Railroad. It had a well equipped plant, a large body of minerals of first quality, a competent selling force, and orders for coal to its capacity. On an adjoining division the mines of the Berwind-White Coal Mining Company were situated, and further west those of the Keystone Coal and Coke Company. The trade and transportation conditions of

the bituminous coal business were average, normal and ordinary. The car equipment of the railroad company was a burden on its hands, was lying on storage sidings, and coal generally was sluggish in the market. By reason of its superiority, the Coal Company's coal was always in demand. It made requisition day after day for a car supply in the manner and at the time prescribed by the orders of the carrier. It supplemented these requisitions by personal calls upon the executive heads of the carrier, by correspondence and by telephone demands, urging that it be given a car supply commensurate with its needs and its business.

At all times the defendant below, the Pennsylvania Railroad Company, had on its records, for use in times of emergency and of car shortage, a system of coal car distribution, by which owners of coal mines were supposed to be regulated at such unusual periods. In times of free car supply the rating and distribution rules were purely negligible, except as they were used by the carrier to dominate and control the bituminous coal business. During a portion of the time covered by the action, the distribution sheets of the carrier showed that the latter was able to meet one hundred per cent. of the demands of all coal operators, if it wished.

Notwithstanding the car surplus, plaintiff below was unable to get a supply at all adequate or sufficient for its business needs. In vain it called upon defendant below to observe its obligations. At times the latter admitted that the former was not being justly treated, at other times it maintained silence, and upon occasion it shielded itself behind a distribution or a rating rule.

During a large part of the action cars that were properly distributable to plaintiff below were, with others, diverted to the Berwind mines. For this con-

duct, plaintiff-in-error offered no excuse whatsoever. Berwind, in addition, had a great number of private cars, as did the Keystone and other companies, competitive with the Coal Company.

Conditions continued unbearable for the Coal Company. In a period of car plenty it received as low as ten per cent. of the car equipment needed for its trade, (Exhibit 43, page 165, Transcript of Record), its coal business was run at a heavy loss, and its orders were drifting to Berwind and others fortunate enough in some manner to command a car supply. It could not assure deliveries of its coal, for which its customers were clamoring, because defendant below would not perform its charter obligations. Business drifted to competitors, who were able by some means to guarantee deliveries. Finally, plaintiff below saw the writing on the wall, and rather than run its organization at a constant loss, it sold part of its coal to Berwind and Keystone and others in a position to command a car supply from the Railroad Company. These competitors thereupon assumed the place of the latter as a common carrier, saw that the plaintiff below got cars in such measure as their own needs might justify and require, and the Coal Company's shipments increased in volume. To accomplish this end, the latter was compelled to sell its coal to said competitors considerably below the market. During the entire transaction the Railroad Company was amply able to fill all the requisitions of the Coal Company to the uttermost degree.

The Coal Company brought action against the Railroad Company to recover damages for loss it had suffered at the hands of the latter, (a) by its discriminatory conduct in the distribution of cars; (b) by its failure to furnish it an adequate and sufficient supply of cars under ordinary trade conditions.

Both branches of the action were made out by the proofs, and plaintiff below established conclusively that defendant below had violated its common law duty as a carrier. Although the discrimination was proven, the damages on that branch were not liquidated. The amount of injury that had been sustained on the other branch was left to the jury, which found that by reason of loss of profits on unmined coal, and loss sustained through excess cost of producing the restricted output of coal actually mined, plaintiff below should be compensated in the sum of \$145,830.25.

ARGUMENT

STATEMENT OF QUESTION INVOLVED.

Whether a carrier, in normal times and with normal business and transportation conditions prevailing, is answerable in damages to a coal operator, for arbitrary and captious refusal to furnish him with cars in which to load his product, said carrier at the time having a surplus of rolling-stock?

FALSE PREMISES OF PLAINTIFF-IN-ERROR.

It is important first to take a general survey of the propositions of fact on which plaintiff-in-error relies, that their true worth as premises for its subsequent conclusions may be judged.

At page 4 of its brief, plaintiff-in-error complains that the Supreme Court of Pennsylvania overruled its contentions:

(a) That it had fully conformed to its duties, whether they be attributed to the Interstate Commerce Act, or to common law, when it had equipped itself with a supply of cars adequate for the demands of the coal business on its lines, and had made a proper *pro rata* distribution of these among shippers when conditions made necessary such a method of distribution.

(b) That the defendant-in-error had made no demands for cars other than those allotable under the distribution system in force with the railroad company.

Contention (a) assumes as a fact:

FIRST: That there were conditions which made a *pro rata* distribution necessary; and

SECOND: That in such conditions proper distribution of cars *pro rata* was made.

The violence and the unwarranted character of these assumptions are noteworthy phases of the case. Considering the first thereof, it is sufficient to point out that universally by Federal Courts of all the districts, by appellate Circuit Courts, and by this Court, *pro rata* car distribution is recognized as permissible only in times of stress, when demand for cars exceeds the supply, when unusual trade, transportation or labor conditions create a shortage. The Interstate Commerce Commission has similarly held.

The uncontradicted evidence in the cause showed to a mathematical certainty that conditions did not exist warranting a *pro rata* distribution. The reverse was true. Witness after witness testified that the times were normal as to demand for coal.

(See Jardine, Rockwell and Van Pelt: Transcript of Record, page 155, and McCormick, *idem*, page 38.)

This state of facts shown by the record is epitomized by the trial court in his opinion overruling a motion for a new trial in the following language to be found at page 107, Transcript of Record:

"In the first place it was proven *conclusively* that the coal trade conditions during the period of the action were normal," and in the following language at page 105 of the Record:

"Further, the proofs on both sides show that the conditions of the bituminous coal trade were normal, and the defendant company proved *conclusively* that it had a *surplus* of cars and in fact stored cars during a portion of the period."

The assumption that proper distribution *pro rata* was made is proven an impossible proposition by the testimony of the Railroad Company's witness, G. E. Oler, (pages 84, 86, 87 and 88, Transcript of Record), from which it appears that cars to the following numbers, *although plying on the carrier's line for use in the coal trade on this particular division were not counted in the distribution*, and defendant-in-error was excluded from participation therein:

1903	- - -	20,068 cars
1904	- - -	25,212 "
1905	- - -	23,216 "
1906	- - -	120,023 "
1907 (three months)		16,437 "

No proper explanation was ever offered for such conduct.

Contention (b) assumes an absence of all demands for cars by the coal company except for those allotable under the distribution system in force with the carrier. Nothing could be further from the truth. The record is replete with testimony to show that the routine for car requisitions was supplemented by constant demands made by officers and employees of the Coal Company. To that effect is the testimony of Mr. McCormick, (Record, page 18):

"Q. State during the period of the action what kind of railroad car supply the Sonman Shaft Coal Company had at its Sonman mine?

A. Fearful.

Q. Did you make any efforts to remedy it?

A. Continual efforts to remedy it.

Q. How?

A. By personal calls, by telephone calls, and by correspondence; every way possible.

Q. Upon whom did you call?

A. Well, we called upon from the President down—President Cassatt and Vice President Pugh."

Reference is also made to defendant-in-error's exhibits 6, 7, 11, 12, 19, (pages 30, 31, 32 and 35, Transcript of Record), which are here reproduced:

(Copy of Plaintiff's Exhibit No. 6)

"May 8th, 1903.

Mr. A. J. Cassatt, President P. R. R. Co., Philada, Pa.

Dear Mr. Cassatt: Since writing you April 25th, we have only received the following cars:

April 27th, 2-100000

" 28th, 5 "

" 29th, to

May 2nd, 4 " 1.70, 4-60, 1-50

" 5th, 9 "

" 7th, 2 "

We cannot understand this, as we are informed from various sources that many of the coal mines are receiving more cars than they need and that coal is hard to sell.

We have taken yearly contracts and are unable to fill same. We are being discriminated against and we would appreciate greatly if you could in some way see that we receive fair treatment from your company. Am sorry to trouble you about this matter, which may seem small to you, but it has been a constant source of trouble and worry from the time we first started to operate, four years ago.

Yours very truly,

vcm-a"

(Copy of Plaintiff's Exhibit No. 7)

"May 13th, 1903.

Mr. A. J. Cassatt, President P. R. R. Co., Philada., Pa.

DEAR SIR: Yours of the 9th inst. received, enclosing copy of letter from Mr. W. W. Atterbury, General Manager, in regard to car supply at Sonman Shaft.

According to Mr. Atterbury's figures we were entitled to 1702 cars from September, 1902, to April, 1903, inclusive, which is less than 25% of our rating. Are we not entitled to as large a percentage of our rated capacity as any other shipper on your road, and, if so, can it be possible that no other mine during the period referred to received cars for more than 25% of its capacity?

With regard to my impression that many of the mines received more cars than they needed, I understood you in our conversation at Donegal that such was the situation and *you seemed surprised that at that time we were not getting a fair supply of cars. That information was confirmed by a superintendent of the P. R. R. who also expressed surprise to a representative of our company that we were not at this time receiving all the cars we needed.*

Do you believe with Mr. Atterbury that we have been reasonably well taken care of in the matter of car supply and that we have received as large a proportion of cars as the Berwind-White?

Thanking you for your interest in this matter, I remain,

Yours very truly,

vcm-a"

(Copy of Plaintiff's Exhibit No. 11)

"February 29th, 1904.

Mr. M. Trump, Acting General Superintendent, P. R. R.
Altoona, Pa.

DEAR SIR: We have a vessel at Philada. awaiting coal from our mine, which coal is to be shipped to Charleston, S. C., where we have a contract to supply coal to the Charleston Consolidated Railway, Gas & Electric Co. They are nearly out of coal, and will have to shut down if we cannot ship them coal. Can you not give us a special order for twenty steel cars, at once? Last month we averaged only *four cars per day*, which was certainly poor treatment, considering our capacity is *forty cars per day*? I took the matter up with Mr. Creighton, who wrote me that he realized we had not received our full proportion and would make it up this month. During February we have received an average of *only five cars per day*. I hope you will be able to give us more cars, but we must have twenty steel cars to load the vessel now waiting at Greenwich.

Yours truly,

vcm-a"

Treasurer.

(Copy of Plaintiff's Exhibit No. 12)

"March 29th, 1904.

Mr. M. Trump, Act'g. Gen'l. Superintendent, P. R. R.,
Altoona, Pa.

DEAR SIR: Last week we received *only seven steel, five hopper and two foreign cars*, just enough for one day's run. We are not receiving enough cars to keep our own concerns supplied. Our neighbors are getting more cars. Can you not do something for us?

Yours truly,

vcm-a"

Treasurer.

(Copy of Plaintiff's Exhibit No. 19)

"PENNSYLVANIA RAILROAD COMPANY
Pennsylvania Railroad Division
Office of General Superintendent

G. W. CREIGHTON.

Altoona, Pa., February 3, 1904.

Mr. Vance C. McCormick, Treasurer Sonman Shaft Coal
Co., Harrisburg, Penna.,

Acknowledging your favor, February 1, relative to
the distribution of cars. It is true that the number de-
livered to your operations, during the month of January
was a little short of their proportion. We have arranged
to make up this shortage, at the earliest moment.

G. W. CREIGHTON,
General Superintendent."

Also to show effort made to obtain cars we quote
from the testimony of James Stran (Record page 152):

"Q. How was the car supply in general?

A. Rotten.

Q. As superintendent have you made any effort to
improve it?

* * * * *

A. Yes sir, through my office."

To the same effect is the testimony of Frank H.
Palmer, superintendent in charge until October, 1904,
(Record page 156):

"Q. What was the state of the car supply during
your superintendency?

A. Well, it was very poor, and I would judge prob-
ably about 33 1-3 per cent. of the time the mine was in
operation during the time I was there.

* * * * *

Q. Did you make any effort to improve the supply?

A. Yes, I made quite a few visits to Altoona."

The falsity of the premises of the plaintiff-in-error is
patent.

THE JURISDICTIONAL QUESTION.

"Whenever one engages in that business (Common Carrier), the obligation of equal service to all arises; and that obligation irrespective of legislative action or special mandate can be enforced by the Courts."

Missouri Pacific Railway Co. vs. Larabee Flour Mills Co.,

211 U. S., 612.

No question of rules or regulations either by the Railroad Company, the Commerce Act or the Commission is here involved. There was no occasion for any rule, for it was alleged by the Coal Company, and conceded as well as proven by the Railroad Company that the latter had on hand and available for distribution—if it wished to distribute them—an abundance of cars at all times during the period of the action.

The question is, could plaintiff-in-error under such circumstances deliberately and wilfully refuse to deliver cars to defendant-in-error, hide behind the Federal statutes and drive the Coal Company into the Federal Courts for redress?

The substance of the complaint is that the Coal Company did not get into Commerce at all. Certainly there is no such thing as interstate commerce in not shipping unmined coal.

The Railroad Company argues that the cars ordered and not furnished *might have been* used in interstate commerce. We respectfully submit that the principles of law pertinent to questions of interstate commerce, in a case of this character have no application to non-existent commerce. In other words we contend that it is futile to becloud the issue with arguments that relate to

commerce *in esse*, because the shipments we were denied, by virtue of that denial, were but commerce *in posse*.

This principle has nowhere been more forcefully expressed than in

Coe vs. Errol, 116 U. S., 517, 528,

from which we quote the following:

"Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. But this movement does not begin until the articles have been shipped for transportation from one State to another. * * * *Until actually launched on its way* to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State and never put in course of transportation out of the State. * * *

Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing."

The rule there promulgated has been followed unvaryingly in a multitude of cases, among which are

P. & S. Coal Co. vs. Bates, 156 U. S., 577.

Kelley vs. Rhoads, 188 U. S., 1.

Diamond Match Co. vs. Ontanagon, 188 U. S., 82.

Gulf, C. & H. R. Co. vs. Texas, 204 U. S., 403.

United States vs. Del. & H. Co., 213 U. S., 366.

Southern P. Terminal Co. vs. I. C. C., 219 U. S., 498

With slight change in form we have the rule in the following words:

"When freight actually starts in the course of

transportation from one State to another it becomes a part of interstate commerce,"

as recently as

Illinois Central Railroad Company vs. De Fuentes,
U. S. Adv. Ops 1914, page 275.

The same thought is embodied in the concurring opinion of Mr. Justice Holmes in the *Larabee Flour Mills Co.* case, 211 U. S., at page 624, when he says:

"I concur in the judgment on the ground that *the cars had not yet been appropriated to interstate commerce, and so were subject to State control.*"

And in the same case, at pages 624-5 Mr. Justice Moody, in dissenting, distinctly asserts that

"Upon the peculiar facts of this case it is possible to say that the cars whose transfer was directed did not become the subjects of interstate commerce until they had been selected as such *after their delivery upon the tracks* of the Santa Fe Railroad. If the decision were put upon that ground I should be silent";

thereby in effect saying that if the case were rested upon the legal proposition that the Coal Company in the case instant is at this point invoking, he would not have dissented.

Our proposition, moreover, gains substantial support, by analogy, from the decision of this Court in *United States vs. Del. & H. Co.*, 213 U. S., 366, in which the commodities clause of the Hepburn Act was interpreted. That clause, *inter alia*, prohibited carriers from carrying in interstate commerce products in whose production they were engaged, or in which they were interested, directly or indirectly. The carriage of coal was involved in the controversy. The opinion of this Court (page 408) was delivered by Mr. Chief Justice White,

who said that the prohibitions of the Act then under discussion concerning ownership in coal transported

"refer to the time of the transportation of the commodities"

and that prohibitions of the clause against an interest in the coal transported

"do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest direct or indirect in them."

Later in the same opinion (page 415) the Court summarizing its findings announced:

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions:

(a) When the article or commodity has been manufactured, *mined* or produced by a carrier or under its authority, and *at the time of transportation*, the carrier has not in good faith, *before the act of transportation disassociated itself from* such article or commodity * * * "

At page 392 of the opinion we find the following expression:

"Some of the corporations owned and worked mines, and transported over their own rails in interstate commerce the coal so mined, either for their own account or *for the account of those who had acquired title to the coal prior to the beginning of the transportation*".

We respectfully submit that the logic of the case just cited sustains the contention we are now making, as well as the "f. o. b. cars at mines" proposition which

has been argued at some length in the recently presented Puritan case.

The Railroad Company has cited a number of decisions of this Court in support of its proposition that there is no jurisdiction in the State Court. It has failed to show by any of them, however, that this Court has held the Interstate Commerce Commission or the Federal Courts to be invested with exclusive power to determine whether it be wrong in law or morals for a carrier, arbitrarily and without the least excuse, continuously and contemptuously to refuse to furnish cars to a would-be shipper.

The cases relied on by plaintiff-in-error deal solely with the interpretation of *rules* and *regulations*, and when the State Court was reversed for taking jurisdiction it was, without exception, because it gave force and power to a regulation by the State Commission or the local Legislature where the subject matter had been covered by Federal action.

These cases are analyzed elsewhere in this brief.

There is no pretense here that the Railroad Company followed any rule or attempted to follow any rule laid down by the Commission or itself. The complaint in the case in hand grows out of a wanton wrong inflicted upon the Coal Company deliberately, designedly and in scorn of consequence.

The wrong in this case could not have happened by accident, any more than it did in the Puritan case. There the plaintiff below showed by the identical written orders the cause of the wrong and the intention to inflict it. In the present case it was shown that day after day defendant below permitted a large supply of cars to stand idle on its storage sidings, notwithstanding orders and persistent efforts by the Coal Company to get them. Under

such proof there can be no shelter behind a pretended rule, or of the Interstate Commerce Commission and the Federal judiciary. The best that the carrier can do under such circumstances is boldly to admit the wrong as it did in the Puritan case.

We confidently contend, that there is no open question here, on the law of this case. Every principle involved has been repeatedly decided by this Court, against the legal proposition of the plaintiff-in-error.

If the legal proposition of the latter is to prevail the case of *Missouri Pacific Railway Co. vs. Larabee Flour Mills Co.*, 211 U. S., 612, must fall. That case has never been doubted by this Court as the law of the land.

The Railroad Company gets its right to be and to do business, from and under the laws of the State of Pennsylvania. When it was granted those rights, it solemnly agreed to be governed by the laws of the State, and the very condition upon which those rights were granted was that it would treat every shipper with equality in furnishing facilities for and in transporting freight. Its position now is, that notwithstanding said obligations it is not amenable to the laws of said State—that it will not be controlled by the Courts of said State—that it will not observe its promise, and that the power which created it is helpless to render her citizens relief from a wrong wantonly inflicted.

This position is not assumed by the plaintiff-in-error because of its obligation to any other authority, or its obligation to obey the rule or mandate of any other power, but to shield it from the consequences of an undoubted wrong, said wrong being inflicted upon a citizen of the State and thereby upon the State itself.

The Railroad Company may and does invoke the laws and the constitution of Pennsylvania against all of-

fenders to preserve and to protect its rights and its property, and to acquire the property of the citizen for its own use and benefit. It can invoke the police power of the State to drive the citizen from its rights and franchises; and in return it says that neither citizens of the State, the courts of the State, nor the State itself can invoke said police power to regulate the dealings of the defendant with its patrons.

Its position is, that a citizen of California denied a car to ship his farm products across a county in his home State, by a railroad company doing an interstate business, must seek redress in a tribunal three thousand miles away, the cost of reaching which will be many times the damages claimed. If this is the law, then the boasted relief the people were expected to get from the Interstate Commerce Act, is turned into a burden unbearable.

The wrong in this case was done within the State of Pennsylvania by one citizen to another; a flagrant wrong done deliberately, knowingly, purposely; not by virtue of any rule or regulation, but by pure force, in contempt of the primary rights of our citizens, of the law of the State and of the promises of the defendant below. *Why not redress it here?*

The defendant below did not refuse to deliver the cars ordered because they were ordered for interstate commerce, and as a matter of fact they were not so ordered. It made no objection on that ground, and it is not fair now to permit it to set up an excuse that it did not then invoke, to avoid the jurisdiction of its sovereign.

It is against the policy of this august tribunal to permit the Railroad Company thus to "mend its hold".

Railway Co. vs. McCarthy, 96 U. S., 258, 268.

To say that when a citizen is deprived of facilities

to enter into business, he is engaged in interstate commerce is to state an absurdity. If the wrong had been inflicted after the coal was loaded and had entered into interstate commerce, the Federal authorities might control.

But our complaint is that *Sonman Shaft Coal Company* was not permitted to engage in commerce, because of the wilful wrong of the plaintiff-in-error and its wilful refusal to perform a common law duty.

Refusal to put a car into a siding is no more interstate commerce than is the wrongful spiking of a switch to said siding.

Certainly the coal unmined and unshipped was neither in interstate commerce nor commerce of any other kind.

Plaintiff-in-error by a variety of arguments undertakes to show that this action, if maintainable, results from a violation of duty referable to obligations imposed by the Interstate Commerce Act. To that end it cites *Mitchell Coal & Coke Company vs. Pennsylvania Railroad Company*, 230 U. S., 247. That case in its facts, however, is essentially different, and is founded upon the payment or non-payment of certain lateral allowances whose reasonableness required pre-determination by the Interstate Commerce Commission.

To the same end, the brief of the Railroad Company, (page 13) quotes as to Section 9 of the Interstate Commerce Act, from the report that accompanied the Bill when it was submitted in its final form by the House Conferees.

The language of one of the House Conferees, Mr. Crisp, is also quoted.

We first invite attention to the language of Section

9 of the Act of 1887 which reads that the person injured may bring suit in a District or Circuit Court of the United States for damages for which

"such common carrier may be liable under the provisions of this Act."

We then especially direct attention to the thought that matters sued for in the case at bar are not dependent upon the Interstate Commerce Act at all for their actionable quality, but upon the common law; that plaintiff-in-error practically and to all intent and purpose so admits, and even goes the length of suggesting that as far as Congress was concerned there was no duty imposed upon railroad companies to furnish cars to shippers until the passage of the Hepburn Act of June 29, 1906, (Brief, pages 19 and 21).

We then ask that the Court consider the proviso of Section 22 of the Commerce Act of 1887 that

"nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are IN ADDITION to such remedies."

That this proviso was intended to be a vital force is shown by the language of Mr. Crisp himself, when he was being heckled by a fellow-member about the very words quoted at page 14 of the brief of the plaintiff-in-error. The colloquy is found in the Congressional Record, Forty-ninth Congress, second session, Volume 18, part 1, page 822, as follows:

"Mr. Weaver. I do not desire to detain the House much longer. But, Mr. Speaker, it is conceded here that there is power on the part of the Government to confer jurisdiction on the State courts.

Mr. Crisp. Let me call the gentleman's attention to another fact, and I will not interrupt him again. I thank him for his courtesy in yielding to me.

If any remedy exists in State courts, it exists at common law, does it not?

Mr. Weaver. Certainly.

Mr. Crisp. For any violation of the common-law rule—we concede most of these provisions are the same as the common-law rule—this act provides that nothing therein shall in any way abridge or alter the remedies now existing at common-law or the statutes, but the provisions of this act are in addition to such remedies."

The force and effect of this proviso to Section 22 of the Act have been quite recently argued in the Puritan case, and we shall not labor this brief with repetition of the principles for which we there contended or the authorities in support of them.

We, however, again refer to the fact that the Larabee Flour Mills Company case in 211 U. S., 612, is decided as a proposition of general law, upon common-law principles, and to substantiate the assertion we quote words of the Court's opinion in the concluding paragraph thereof (page 624) as follows:

"While here is presented, as heretofore indicated, the question of the power of the state to prevent discrimination between shippers, and the *common-law duty resting upon a carrier* was enforced."

This shows conclusively that common-law duties of interstate carriers were enforceable in state forums when

violated years after the passage of the Commerce Act.

That this conclusion is the deliberate judgment of this Court is further proved by its decision in the second case of

Missouri Pacific Railway Company vs. Larabee Flour Mills Company, 234 U. S., 459,

which, although reversed on other grounds, was upheld in so far as it concerned the award of damages by a State court for business losses sustained by a shipper through non-observance by an interstate carrier of its Common-law duty.

A point made by the carrier was that the supersedeas bond given by the plaintiff-in-error was the shipper's sole resort in seeking damages after affirmance of its judgment. This Court said that affirmance of the judgment

"opened the way for the Court below to consider and determine how far the alleged conduct of the railway company had entailed damages and consequent responsibility.

Conceding further that the bond for supersedeas embraced such acts and the resulting damages therefrom * * * the right to resort to the bond *did not imply an exclusion of the right to sue under the general law to recover damages.*
* * * " (page 473)

The Carrier's Duty to Furnish an Adequate Supply of Cars.

The duty of a railroad company in ordinary times to have an adequate car supply, with the logical corollary—to furnish them to shippers making requisition in good faith—is so clearly recognized by the Supreme Court of the United States in the early part of the opinion in

Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S., 452,
in the following language:

"Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of cars,"

etc. that it would seem a work of supererogation to labor the thought with supporting arguments.

The same thought is recognized by many courts of last resort throughout the country, notably in

Yazoo & M. V. R. Co. vs Blum Co., 40 So. Rep. 748

Hoffman Co. vs. Ry., 94 S. W. (Mo.) 579.

Houston & Tex. Ry. vs. Smith, 63 Tex. 322.

In *Yazoo etc. Co. vs. Blum Co.* the court adopts the rule as it is announced in 5 Am. & Eng. Encyc. of Law, pp. 160, 167, 169, 256, as follows:

"The duty of carriers embraces, not only the duty to transport goods accepted by them, but to do so promptly and within a reasonable time * * *

But in the case of railroad and similar companies, endowed with special and unusual powers with express view to their rendering to the public a freight and passenger service *adequate* to the needs of the country through which their lines pass, the law imposes the obligation to have and to furnish *sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, and they are liable for a failure to transport promptly, whether*

the failure is due to a want of facilities or to a capricious refusal to carry."

And further quoting from 5 Am. & Eng. Encyc. of Law the said Court approves the doctrine that although unusual and unexpected press of business will under certain conditions excuse delay, the carrier is not excused if derelict in its duty "to have and *provide proper facilities for transportation.*"

We deny that the common law obligation of the carrier has been superseded by an action in one of the forums prescribed by the Act to Regulate Commerce, notwithstanding the amendment of 1906.

Southern Railway Company vs. Reid, 222 U. S., 424, is not helpful to the Railroad Company. It reads in part, "There is scarcely a detail of *regulation* which is omitted to secure the purpose to which the Interstate Commerce Act is aimed." The problem here before the Court is not one of regulation at all, but one of the enforcement of a common law duty. If it were one of regulation, however, the very language of the opinion in the case last cited proves that failure to furnish an *adequate* car supply is not within the scope of the Act or redressable under the Act. The very fact that the Act to Regulate Commerce prescribes with particularity the matters thereby taken possession of, and that furnishing an *adequate* car supply is not one of them, argues by force of the rule "*inclusio unius est exclusio alterius*" that failure in the common law duty of a carrier to *furnish* a shipper with *adequate* facilities when the same are at hand is not one of the things for consideration of the Commission.

Be that as it may, it is important to bear in mind what was decided in the case of Southern Railway Co. vs. Reid, which appears at page 442: "By these provisions

(of the Interstate Commerce Act) Congress has taken possession of the field of regulation with the purpose, which we have already pointed out, to keep under the eye and control of the Commission *the rates charged and the action of the railroad in regard to them*, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties."

In that case the carrier's duty as defined by a North Carolina statute, which the North Carolina Courts held the carrier bound to perform under pain of a fine, *conflicted* flatly and uncompromisingly with a mandatory provision of the Interstate Commerce Act. To have recognized the North Carolina law would have been to fly in the face of the Federal law. Manifestly the former had to give way.

Even if it were conceded that the shipper could get redress from the Commission upon complaint made that the carrier failed to furnish an adequate car supply, the jurisdiction of the State tribunal is saved by the express language of the 22d Section of the Act to regulate Commerce: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at Common Law or by statute, but the provisions of this Act are in addition to such remedies."

Only in case of conflict does the common law redress of the shipper yield in favor of the redress prescribed by Federal enactment.

This legal proposition has so recently been elaborated here by the same counsel, in the case of the Puritan Coal Mining Co., that we shall not encroach upon the time and patience of the Court by needless repetition.

In addition, we believe that the whole question has been absolutely decided adversely to plaintiff-in-error's contention in

Galveston, H. & S. A. R. Co. vs. Wallace, 223 U. S., 481, wherein it is held that State courts have jurisdiction to entertain suits upon causes of action arising under amendments to the Interstate Commerce Act itself, where the injury sought to be redressed is not traceable to some cause *exclusively redressable* under Section 9 of the *original Act*, before the Commission or the Federal Courts.

The Court there held that damage caused by failure to deliver goods—common law breach of duty—was in no way traceable to a violation of the Act to Regulate Commerce, and was not within the provisions of Section 8 and 9 thereof.

Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S., 208.

What we desire to impress upon this Honorable Court is that *the cause of action that eventuated in a recovery in the present case, is one in no way traceable, directly or indirectly, to the "Act to Regulate Commerce."* It was actionable for generations before the Interstate Commerce Commission had a being, was neither added to nor detracted from by the Act of 1887, its supplements or amendments, and had its origin in those elementary principles of right and equity that are the heritage of our race.

At the risk of some repetition, we say that none of the decisions relied upon by the defendant below, not even that in the Hardwick Farmers' Elevator case, tends in the remotest degree to overturn these fundamental principles of law. The quotation on page 15 of plaintiff-in-error's argument, excerpted from the Hardwick case, begins with the language "As legislation concerning the

delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce *regulation*." Certainly, that was a different situation from the one in hand, relating as it did to a *rule of action* which a State body undertook to prescribe for the guidance of carriers in the handling of their traffic equipment, and casting a burden upon the flow of cars for interstate deliveries that jarred with interstate regulations.

Hampton vs. St. Louis, Iron Mountain & Southern Railway Company, 227 U. S., 456, does not help plaintiff-in-error nor rule the case at bar. It is a case wherein a regulatory statute of Arkansas, providing that railroad companies shall furnish cars for freight transportation within six days following application therefor is under fire. The Court below held the act unconstitutional, among other reasons, because of a clause in Section 17 reading

"Interstate railroads shall furnish cars on application for interstate shipments, the same in all respects as other cars to be furnished by intrastate railroads under the provisions of this Act,"

construing the clause as an interference with interstate commerce.

This Court, speaking through Mr. Justice Lurton, in reversing the lower Court, suggests the invalidity of the Act if it be construed "to *regulate* the furnishing of cars for interstate commerce;" but in the same paragraph says, "*That clause probably means no more than that there shall be no discrimination against demands for interstate shipments.*"

Houston & T. C. R. Co. vs. Mayes, 201 U. S., 321, is not in point because it concerns another *regulatory statute*, by which a carrier is required to furnish cars

To keep up prices for its friends and favorites it made coal cars *artificially short*, and practically put out of business the defendant-in-error, a formidable competitor in the same market as the favorites.

That we are not overstating the proposition is shown by the colloquy between counsel for the Railroad Company and Mr. McCormick, witness for the Coal Company, to be found on pages 56 and 57 (Transcript of Record), and by the following from page 54 of the Record:

"Q. If every operator dealing in the same coal that you were operating had been able to assure these middlemen or the consumers of full and regular deliveries under the contracts which might have been made, would the prices have been as good as they were?

A. Mr. Bikle, that is just what we went into this mine with that object.

Q. Now just wait?

A. I am going to answer your question. That is exactly the condition we wanted. We wanted to get all the cars we could get, we were satisfied with low prices, but we were going to make our money on a big tonnage, because we had the best grade of coal in Pennsylvania. The fellows that would have suffered under your theory, because you gave all the consumers plenty of cars and all the coal they needed the price of coal is going down, is to my mind the wrong theory for the railroad company to work on."

The strictures of the trial court upon the attitude of the plaintiff-in-error are none too severe, indeed they are quite mild considering the occasion giving rise thereto. In his charge to the jury (Transcript of Record, page 94) he said.

"As we look at the matter, a person, a firm or a corporation, has a right under the law to buy or lease a coal property along the line of a railroad, to open up that property for shipping coal, to provide an equipment according to the acreage and output intended to be shipped, and has then a right to demand from the common carrier the necessary facilities to carry on the business according to the requirements of that mine. He has a right to take his chances in the market along with everybody else and *it is not the business of the common carrier to try to regulate and control the output of coal so that the market for coal can be controlled in either quantity or price.*"

In the opinion overruling motion for a new trial the trial court refers to the subject (Transcript of Record, page 105) as follows:

"The primary duty of a railroad company in ordinary times and under ordinary conditions is to have an adequate car supply for the needs of the country through which the lines pass and to furnish such cars to shippers when requisition therefor is made in good faith. *In this respect the coal business does not differ from any other business, although the defendant railroad company seems to have taken the position that they have a right to regulate the coal market.*"

And in the same opinion (Transcript of Record, page 113) thus:

"The argument of counsel frequently made, that the furnishing of cars according to the duty of the railroad company would result in demoralization of the coal trade, is a pure creature of imagination raised up to justify the failure of defendant's offi-

cials to do their full common-law duty to their shippers in the coal trade. The demoralization occasioned by the doing of its duty by the railroad company is purely imaginary. The coal trade would adjust itself like any other business in a very short time. Fierce and unnatural competition, sufficient to occasion demoralization, would soon vanish and it would be a question of the survival of the fittest along the most legitimate lines. Any other theory of the duty of a common carrier leads to rank discrimination and the greatest injustice to individual shippers, and the case in hand is an ample illustration of such injustice."

At two places in the Railroad Company's brief (pages 30 and 35) it is set forth that the *pro rata* allotment of cars was necessary because the demands or requisitions of shippers for cars exceeded in the aggregate the number which the plaintiff-in-error had available. Putting aside the point that *available* has already been shown to be a word adopted, by excluding from the car distribution pool many thousands of coal cars, *the record is barren of evidence to show any demands of shippers exceeding in the aggregate, cars for distribution.* It merely shows demands by the defendant-in-error in excess of the supply allotted it.

At page 37 of the brief of the plaintiff-in-error it is parenthetically stated that as a rule cars were ordered up to the rating of the mines by every operator, placing upon the carrier the burden of apportionment of available car supply and of revision downward of the car requisitions. This is purely gratuitous, and not supported by testimony.

The true situation had no relation to *aggregate demands* for cars as already explained with reference to

the excerpt from page 2 of the brief. This situation is reiterated in the third paragraph of page 33 of the brief; and it is respectfully submitted that the averments at pages 30, 35 and 37 above referred to are misstatements, and misleading.

That the carrier had an abundance of cars is demonstrated by the testimony of J. W. Manly, the Railroad Company's witness (Transcript of Record, pages 164 and 165) as follows:

"Q. Have you a record there for April 28th, 1904?

A. Yes sir.

Q. What are shown to be the empty cars by that record to have been on the Pennsylvania Railroad lines, empty bituminous coal cars; they would be stored cars, what I mean by that?

A. We have on that date 900.

* * * * *

Q. Were or were not there unused and stored bituminous coal cars on the lines during the period of this action?

A. Yes sir."

This testimony is supplemented by that of G. W. Creighton, General Superintendent of the Railroad Company (Transcript of Record, page 164) which reads:

"Q. During the time of this action, from April, 1903, to that time in 1907, was there any time when the bituminous coal equipment, any percentage of them were not being used by the shippers?

A. I imagine that there were, yes

Q. * * * We object to the answer and ask that it be stricken out.

A. I can answer it positively.

By the Court:

Q. You say during the period of the action?

* * * The witness has said I imagine there were.

The Court: Now he says positively.

Q. Were there coal cars stored and unused during that time?

A. Yes."

This testimony it must be borne in mind was in support of an offer by the Railroad Company quoted by the trial court in his opinion refusing a new trial (Transcript of Record, page 106) as follows:

" * * * and that there were also empty cars, bituminous coal cars, on their tracks unused during the period proposed to be testified to. This for the purpose of showing that at the the time which the testimony is directed, at such period as the witness may testify to, *there was an adequate equipment in the control and use of the Pennsylvania Railroad Company to furnish equipment for these shippers of bituminous coal.*"

In support of the second major cause, the discrimination in favor of certain coal operators, we invite attention to page 158, 159, and 160 of the record setting forth special orders from those higher up in the Railroad Company to their co-workers, to see that particular care was taken of Berwind-White Coal Mining Company. A specimen is the telegram from G. W. C. (Mr. Creighton) to S. C. L. (Mr. Long), under date of 6-14-03, which we reproduce—(Transcript of Record pp. 158 and 159.)

"S. C. L. Our efforts this week in keeping Scalp supplied with cars have not been at all successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or any of the South Fork Railroad

equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice, and it is important that sufficient cars should be placed early each morning so that all the mines will have a supply to start with and there will be no danger of any of the operations being idle on account of not having cars. To protect ourselves on this arrangement, I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledgment receipt. G. W. C. 6-14-03."

On page 160 the execution of the special orders is proved by the following testimony:

"Q. Mr. Trump, so far as you know were these orders carried out?

A. Well, I can't say. The evidence seems to show that they were not in all cases carried out.

Q. Were they substantially carried out?

A. I think so, yes."

Equally as vicious as these special orders, was the compulsory adoption by defendant-in-error of the vehicles of transportation owned by its competitors for the shipment of its products, at a figure 10 to 25 cents below the market price of the coal. The pertinent testimony on this point is that of Mr. McCormick, from which we ex-

cerpt the following: (Transcript of Record, page 36)

"A. We could have always sold more coal than we could get out, more coal than we could ship.

* * * * *

A. These people we sold to would have liked to have taken more, but we were afraid to contract for more because we couldn't deliver it. Our experience had been that we had to disappoint so many of our customers that we were compelled to cut down the allotment to our different customers.

Q. What reason was there for your failure to deliver?

A. Because we could not get cars. The Central Iron & Steel Company, of which I was a director, we could have given them all their steam coal. We were forced to buy coal from Berwind-White so they would be sure of getting the coal, *because Berwind-White got the cars.*"

From pages 41 and 42, Transcript of Record:

Q. In order to get a sufficient car supply state whether you made any other arrangements with any other operators for cars?

A. We frequently did that. We did that with the Keystone Coal & Coke Company. *We would have to sell our coal at lower prices in order to get them to put their cars in.* We sold below the market * * *

Q. Did you make arrangements with any other operators?

A. We made arrangements with Berwind-White to place their cars at the mine.

Q. What was the outcome of that arrangement?

A. Of the Berwind-White arrangement? Well, they placed us enough cars to mine a considerable ton-

nage. *We sold the coal at lower prices than the market to get the cars.*

* * * * *

Q. Did you get their cars?

A. We *always* got the Berwind-White cars. When they said they would put cars in we got them.

Q. How many cars a day did that run?

A. I think we got enough cars for 500 tons a day for a time and later I think it was 750 * * *

Q. When was that?

A. That was the latter part of 1906 or 1907. I think probably 1907.

Q. You say you dealt with them at \$1.20 a gross ton at the mines. What was the market price?

A. We always could have gotten, if we could have made our contracts for the year at prevailing prices, at \$1.35 during those periods before the first of April, which was always our plan of operation if we could do it.

Q. How many tons did you so sell to the Berwind-White Coal Mining Company?

A. The one contract I remember was 100,000 tons.

Q. For what period did that extend?

A. I think it was a year?

Q. Then in that year are we to understand your tonnage was considerably increased over what it had been previous?

A. Our tonnage was increased due to our getting cars through this arrangement with Mr. Berwind."

The utter indifference of the officers of the Railroad Company to then prevailing conditions is demonstrated by Mr. McCormick's narrative (Transcript of Record, page 19) of an interview with Mr. Cassatt. In that interview attention was directed to the sale by the Railroad Company to the Berwind interests of one thousand cars of the carrier's equipment. President Cassatt calmly dis-

missed the subject by saying that had there been no sale the Railroad Company would have given Berwind the cars anyway, because Berwind was a big shipper and had big contracts.

Plaintiff-in-error is mistaken in stating or insinuating that the charge of discrimination was abandoned at the trial. The damages on that branch were not separately liquidated for one reason, because of a possibility of duplication in the recovery, the Coal Company feeling that a proper verdict for damages sustained through failure to furnish an adequate car supply might include the other item. Again, failure to furnish adequate car supply was in a measure the consequence of the discriminatory acts of the carrier in its policy of dominating the coal trade of Pennsylvania, of compelling the operator under the ban to sell to a competitor below the market, and of aggrandizing the favored producer by special orders for cars.

The trial court in his charge to the jury aptly states the proposition (Transcript of Record, page 99) as follows:

"Now then, Gentlemen of the Jury, it is for you to make a fair estimate of what loss the plaintiff sustained by reason of unfair treatment, if you find there was unfair treatment practiced by the defendant. What it is entitled to is compensation for the loss or injury sustained because the defendant Company failed to furnish an adequate and sufficient supply of cars to its mine. The element of discrimination, that is, unfair treatment because of comparison with other shippers, is not pressed in this suit, although evidence was offered in relation to it. Plaintiff's counsel have said to the Court, and in the presence of the jury, that no claim for discrimination, as such, is made, because they have of-

ferred no proof of such discrimination on which other than nominal damages could be assessed. *The testimony on the subject of discrimination should not enter into your consideration, except as it may show reasons for the failure to furnish an adequate car supply.* It should not, as counsel for defendant seem to fear, have a tendency to prejudice your minds against the defendant or for that reason to enlarge this verdict."

And again states in slightly different language in his opinion overruling motion for a new trial (Transcript of Record, page 109) as follows:

"The claim, however, for discrimination was not pressed and no sufficient data offered on which to base a recovery in that respect. *We do not understand that the claim was withdrawn, but that the plaintiff admitted simply that it had not furnished the data on which the jury could base a verdict for discrimination alone.*"

Under the Facts in this Case, the Number of Cars off the Defendant's Line Was Immaterial.

The offer made while Mr. Trump was on the stand, (Transcript of Record, page 79) intended to prove the number of cars off the lines of the defendant below which would otherwise have been available for coal shipments, we contend was properly rejected. In the light of the case as defendant below developed it, it made absolutely no difference what cars that were on connecting lines would have been available for shippers on the Pennsylvania Railroad but for the fact that they were moving on such lines.

Defendant below went to much trouble to prove that throughout the period of the action there was an *excess of cars on its own lines*, a surplus of cars stored and not in use. How it would constitute a defense, to show that had it not been for the use of certain equipment on foreign lines, there would have been other cars to add to the already existing stored surplus is incomprehensible. Plaintiff below proved beyond shadow of doubt that it had failed to receive an adequate car supply in a normal business period, notwithstanding efforts that were unceasing. Defendant below answered that it had cars, plenty of cars, cars in such quantities that it had to store them—instead of giving them to the Coal Company. We fail to see how plaintiff-in-error's case would have been aided by demonstrating that except for the movement of cars on foreign lines, there would have been still more cars to put in storage.

Entirely apart from this, *the offer was incurably faulty* because it did not propose to prove by the witness or any one following him that any part of the cars then on connecting roads, whose release would have made more cars "available for distribution to the plain-

tiff's mine," would have been allotted or distributed to the Coal Company. Of what possible consequence would it have been had 100,000 cars more been "available" for distribution to plaintiff's mine, unless the availability were coupled with a purpose to allot some of them to plaintiff below, the defendant-in-error?

In support of its offer, plaintiff-in-error cites *St. Louis, etc., Railway Co. vs. Arkansas*, 217 U. S., 136, wherein the Appellate Court of Arkansas was reversed because it refused to allow the railroad company to defend against an action for a penalty imposed by State law for failure to furnish cars within a certain time after requisition made, on the plea that part of the equipment was engaged in interstate commerce and could not be regained at will to accommodate local shippers.

The most casual reference to the case shows an entirely different state of facts from the one in hand.

In the Arkansas case the railroad company in its answer and its proofs defended on the following grounds:

- (a) *An extraordinary demand for cars.*
- (b) *A shortage of cars.*

Undoubtedly it was in order for it to show the facts creating such conditions, as a legal excuse for their existence.

In the *Sonman* case, however, the uncontradicted proofs were that demand for cars was normal and ordinary; that the period was one of average business times and conditions; that many coal mines were receiving more cars than they needed, and that their coal was hard to sell. In addition, the carrier itself proved that instead of a shortage there was a surplus of cars. The offer was properly rejected, because the legal proposition involved had no application to the facts of the

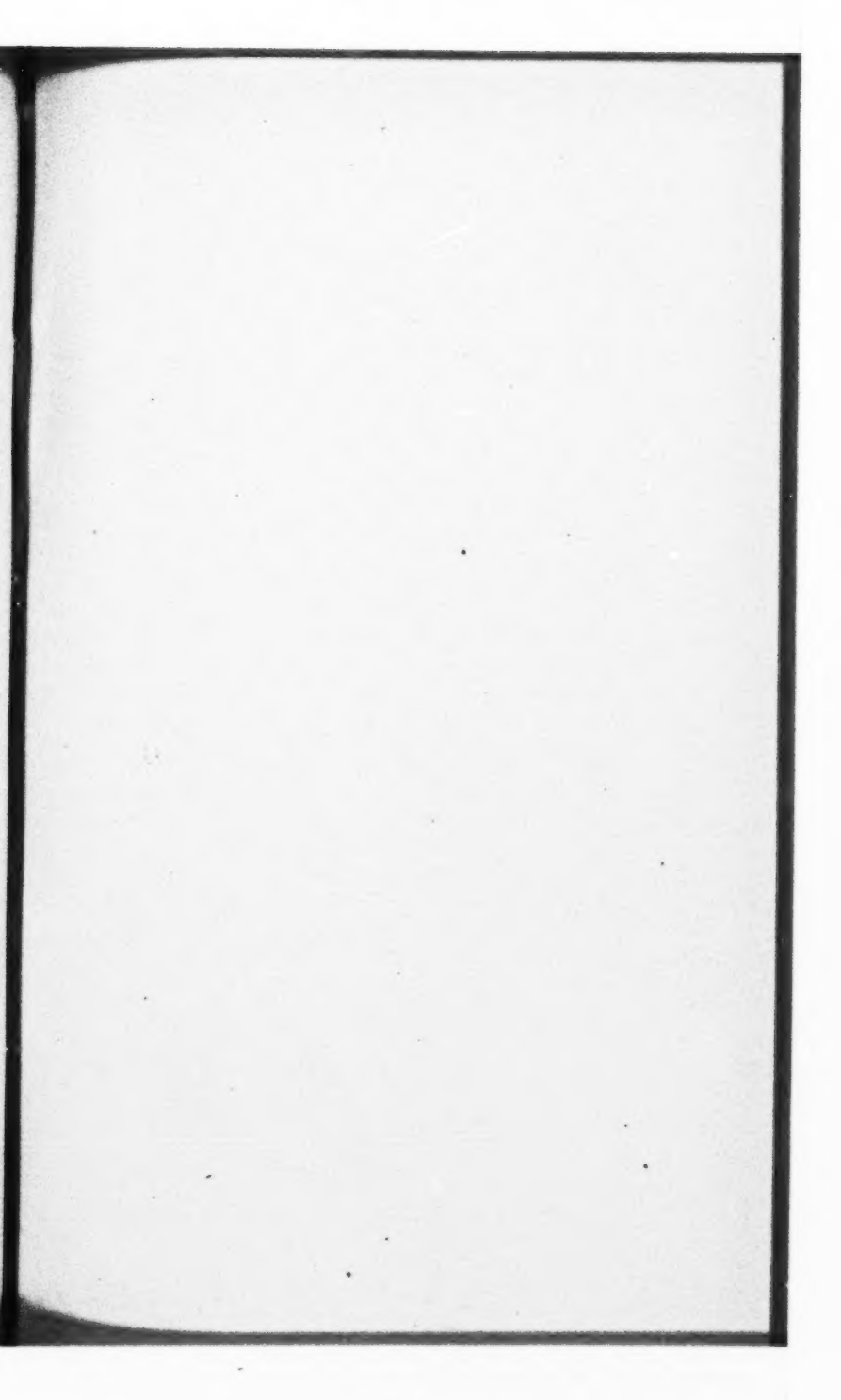
case on trial. As an interstate carrier, in normal, ordinary times, it was the business of the Pennsylvania Railroad Company to be adequately equipped with facilities for interstate as well as State business. Furthermore, as the offer of counsel did not show that there was any unusual use or detention of cars by connecting lines, or any unusual conditions whatsoever, the carrier's performance of its ordinary, usual and obvious duties could not possibly constitute an excuse for its arbitrary denial of cars to the Sonman Company.

In the Arkansas case compliance with the State law would have made it impossible to send cars off the State line in interstate commerce. In the Sonman case all that was required was that plaintiff be given some of the cars stored in Pennsylvania, whereby the common law duty of plaintiff-in-error could readily have been performed.

Moreover, in view of the proofs that over 200,000 cars *actually on its own line* were not taken into the distributive reckoning at all, it becomes immaterial and unimportant what equipment defendant below had on foreign lines.

We respectfully submit that the judgment should be affirmed.

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A. M. LIVERIGHT,
Attorneys for Defendant in Error.



In the Supreme Court of the United
States.

OCTOBER TERM, 1914. No. 288.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Sonman Shaft Coal Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The serious misstatements as to the purport and effect of the evidence embodied in the Brief of the defendant in error necessitate this Reply Brief.

We have in our brief dealt with the legal propositions advanced by the defendant in error in support of the judgment of the Court below, and further discussion of these propositions is not rendered necessary by anything contained in the defendant in error's Brief.

The following statements are made in defendant in error's Brief:—

“The car equipment of the Railroad Company was a burden on its hands; it was lying on storage sidings,

and coal generally was sluggish in the market."
(Page. 2.)

Contrast this statement with the following statement, also in defendant in error's Brief:—

"Witness after witness testified that the times were normal as to demand for coal." (Page 6.)

And with the testimony of Mr. Vance C. McCormick, the treasurer of the defendant in error, who had charge of the selling of its coal, to the following effect:—

"By MR. LIVERIGHT:

"Q. State what the market demands for coal were in the period from April 1st, 1903, to April 1st, 1907; that is to say, whether there was anything extraordinary in the market during that period?

"A. I don't remember anything extraordinary. Simply, to my mind, normal years. The country was in fairly good shape. I mean ordinary business condition, fairly good business condition." (Transcript of Record, page 38.)

These further statements are made in the Brief.

"There was no occasion for any rule (i. e., for allotment and distribution of cars), for it was alleged by the coal company, and conceded as well as proven by the railroad company, that the latter had on hand and available for distribution—if it wished to distribute them—an abundance of cars at all times during the period of the action." (Page 12.)

"Defendant below went to much trouble to prove that throughout the period of the action there was an excess of cars on its own lines, a surplus of cars stored and not in use." (Page 40.)

"Defendant below answered that it had cars, plenty of cars, cars in such quantities that it had to store them—instead of giving them to the coal company." (Page 40.)

None of these statements are supported by the evidence and some of them are in direct conflict therewith. The statement that it was alleged by the coal company that the railroad company "had on hand and available for distribution—if it wished to distribute them—an abundance of cars at all times during the period of the action" is directly at variance with the allegation of the plaintiff's Statement of Claim to the following effect:—

"That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations mining and producing bituminous coal."

The statement that throughout the period of the action there was an excess of cars and that cars were a burden and lying on storage sidings of the Railroad Company, has absolutely nothing to justify it. The defendant in error offered no proof whatever to this effect. Indeed such proof would have been totally at variance with the allegation of the Statement of Claim that the car equipment of the plaintiff in error was inadequate for the needs of the shippers. The plaintiff in error, in order to establish that at times the cars which it had were sufficient even for the requisitions made by shippers (which, as a rule, were largely in excess of their actual needs) undertook to establish that there were times when it had cars in excess of these requisitions. This testimony is set out in part at pages 33 and 34 of the Brief of the defendant in error. By referring to this it will be seen that one witness testified that on a given day—April 28th, 1904—the distribution sheets of the defendant showed that there were empty coal cars on the sidings of the Railroad Company. By refraining from giving the whole testimony of this witness the defendant in error would give the impression that these amounted to 900. The 900 cars which were on sidings on that day included other than coal cars, and there was no testimony as to how many of the 900 were coal cars. The other witness who testified on the subject said that

there were times during the period of the action when there had been coal cars on the sidings.

There will be found at pages 84 and 85 of the Transcript of Record, a statement showing the distribution of cars made in the period of the action, and by referring to this it will be seen that there was only one period when there was a surplus of cars on hand, and it was not necessary to make allotment, this period being from January 1st to 13th, 1906.

Why this allotment was necessary we have pointed out in our main Brief, and in view of the finding of the jury that the plaintiff in error had an adequate supply of cars during the period of the action, it is perhaps unnecessary to advert to the considerations which make it clear that the shippers would not have benefited had the plaintiff in error had a supply of cars which would have been sufficient to enable it to furnish every shipper with cars equal to the capacity of his mine. But it may not be amiss to quote from a letter of the General Superintendent of Transportation of the plaintiff in error, which very succinctly states why the ownership of such additional cars would not have benefited shippers.

"We fully realize that from the mining standpoint a regular and uniform car supply is desirable and conducive to economical operation; but we also fully realize that if we could command sufficient cars to regularly supply all of our 525 mines with cars equal to our adopted ratings or 7211 per day, it would not be more than a week or ten days before cars would be so tied up under load that we would have to place embargoes and that the resultant empty car supply would be just what it is to-day, namely, approximately the number of cars unloaded."

At page 30 of the defendant in error's Brief what is stated to be a colloquy between counsel for the railroad company and Mr. McCormick, a witness of the coal company, is quoted in support of the preceding statement in the

Brief that "to throttle competition and to control the supply of a necessary of life, the carrier undertook in a period of free car flow to say how much coal should be marketed and who should do the marketing. To keep up prices for its friends and favorites it made coal cars artificially short."

The attempt to make use of the inquiry of counsel for the plaintiff in error as to the effect upon the price of coal of shipments up to the capacity of the mines on the plaintiff in error's road as indicative of a desire or purpose on the part of the railroad company to maintain the price at a higher figure than would have ruled had the available cars permitted shipments up to the capacities of the mines, is so disingenuous that it is hard to treat it as a case of over-zeal on the part of counsel.

The inquiry in question was induced by this consideration. The defendant in error in estimating its damages, had assumed that the price of its coal would not have been affected had it shipped an amount equal to the productive capacity of its mines. Of course if it was entitled to cars equal to the productive capacity of its mine, all other shippers were so entitled, and as the volume of shipments would have been more than doubled if all shippers had had cars available for shipments up to their mines' capacities, it was inevitable that in an effort to find a market for the coal the price would be largely reduced, and of course if this would have been the result of a car supply equal to the mines' capacities, then the plaintiff's damages, assuming that it was entitled to a full car supply, ought to have been measured with reference to the price which coal would probably have commanded under such conditions. The Transcript of Record confirms absolutely the accuracy of this statement.

At page 3 of the defendant in error's Brief this statement is made:—

"Finally, plaintiff below saw the writing on the wall and rather than run its organization at a constant loss, it sold part of its coal to the Berwind and Keystone

and others in a position to command a car supply from the railroad company. These competitors thereupon assumed the place of the latter as a common carrier, saw that the plaintiff below got cars in such measure as their own needs might justify and require, and the coal company's shipments increased in volume."

This statement is inexcusably misleading.

There is absolutely no testimony to the effect that deliveries of cars were made by the Railroad Company at the instance of either the Berwind or Keystone Companies for the purpose of enabling the defendant in error to load and ship coal which it had contracted to sell to these companies.

The plaintiff did sell coal to the Berwind, the Keystone and other companies which were owners of private cars, and the railroad company by direction of these owners delivered some of their individual cars at the mines of the defendant in error to be loaded with coal which had been thus purchased.

The cars which were thus delivered to the defendant in error were not distributable cars, and none of them could have been placed at its mines except by direction of their owners. The fact, therefore, that these cars were not delivered except by direction of the companies owning them, and only for the purpose of being loaded with the coal which they had purchased, affords no justification whatever for any criticism of the plaintiff in error. The extract which we have quoted from the defendant in error's Brief, however, was not, we apprehend, intended as a criticism of the real transaction, but was designed to give an erroneous impression of the facts connected with the delivery of these cars.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States

October Term, 1915. No. 25.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

SONMAN SHAFT COAL COMPANY.

In Error to the Supreme Court of the State
of Pennsylvania.

Supplemental Brief of Defendant in Error and
Rejoinder to Reply Brief of Plaintiff in Error.

2 Supplemental Brief of Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN
ERROR AND REJOINDER TO REPLY
BRIEF OF PLAINTIFF IN ERROR

"A"

We assert with confidence that there is no criticism in the reply brief of plaintiff in error, captiously taking to task alleged misstatements in the main brief of defendant in error, which is at all justified by the facts. Both the admissions of the railroad company's witnesses, elicited in part through examination made by its own counsel, and the findings of the jury upon matters submitted to it, justified the comment criticised by the distinguished counsel. The carrier did not condescend below and has not condescended here to offer any excuse for its conduct in refusing to defendant in error cars legitimately ordered by it, when it in fact had cars standing upon its sidings out of service but not out of commission. Neither has it condescended to explain, after its laborious insistence in showing what a plenitude of equipment it possessed, how it came about that the Sonman Company, notwithstanding heroic efforts, succeeded in getting the use of only a small fraction of its rating in that kind of equipment; but that when it made outside arrangements to use Berwind and Keystone cars in which it was compelled to ship its product below the market, the car supply reached it with unparalleled regularity and smoothness, and in much greater volume.

By resorting to the oft adopted device of wrenching a sentence from its context plaintiff in error in its reply brief singles out a statement in the brief of defendant in error to which it takes exception. It objects to the sentence on page 2 of our brief reading: "The car equipment of the Railroad Company was a burden on its hands, it was lying on storage sidings, and coal generally was sluggish in the market." This sentence or state-

ment it contrasts with a later statement at page 6 of our brief that "witness [redacted] or witness testified that the times were normal as to demand for coal", and with certain testimony of Mr. McCormick, abstracted in its reply brief and to be found at page 38, Transcript of Record, to the effect that ordinary business conditions prevailed during the period of the action.

Plaintiff in error need but have read the sentences in the brief of defendant in error immediately preceding and following the sentences criticised to have seen that the whole thought on the point was expressed as follows:—

"The trade and transportation conditions of the bituminous coal business were average, normal and ordinary. The car equipment of the railroad company was a burden on its hands, was lying in storage sidings, and coal generally was sluggish in the market. By reason of its superiority the Coal Company's coal was always in demand."

On pages 33 and 34 of the brief of defendant in error appear excerpts from the testimony and from the offer made by the railroad company at the trial of the cause, which we submit amply justify the statements at pages 12 and 40 of the Coal Company's brief criticised on page 2 of the Railroad Company's reply brief.

Neither are those averments in the least at variance with that part of the Coal Company's Statement of Claim quoted *in extenso* at page 3 of the Railroad Company's reply brief. The paragraph of said plaintiff's statement there set out charges the Railroad Company with failure to "*provide* coal cars adequate and sufficient to meet the ordinary demands of its patrons". This is absolutely consistent with the Coal Company's position throughout, with what the jury said it had abundantly proved, viz., that the Railroad Company *had* plenty of transportation facilities, but failed, for reasons best known to itself, to *provide or furnish* them to patrons, of whom the Coal

4 Supplemental Brief of Defendant in Error.

Company plaintiff in this case was one.

Moreover, it is quite consistent with the proposition which we have contended throughout was proved to a demonstration, that certain operators and they alone could get cars in abundance, and that the carrier undertook to regulate the market by making cars artificially short.

The testimony and the argument of counsel for the Railroad Company—counsel here representing the carrier took no part in the trial—so impressed this position of the Railroad Company upon the Court, that in his charge to the jury he made reference thereto in the following language which we reproduce although most of it is in our main brief:—

“As we look at the matter, a person, a firm or a corporation has a right under the law to buy or lease a coal property along the line of a railroad, to open up that property for shipping coal, to provide an equipment according to the acreage and output intended to be shipped, and has then a right to demand from the common carrier the necessary facilities to carry on the business according to the requirements of that mine. He has a right to take his chances in the market along with everybody else, and *it is not the business of the common carrier to try to regulate and control the output of coal so that the market for coal can be controlled in either quantity or price.* For this reason we, therefore, refused to allow the defendant to prove that the very customers which plaintiff alleges he lost by reason of the irregular and insufficient car supply were in fact supplied by some one else on the Pennsylvania lines.” (Transcript of Record, page 94.)

This instruction of the Court was assigned for error by the Railroad Company, Assignment of Error No. 6, page 94, Transcript of Record, in the Supreme Court of Pennsylvania, and as all assignments were overruled, we

think the matter, now complained of in the reply brief of the plaintiff in error, is to be regarded as an established fact. Had the record in this case not justified the trial Court, the assignment of error would have been sustained.

In plaintiff in error's reply brief an attempt is also made to minimize the effect of the testimony of the carrier's own witnesses as to the surplus of coal cars, and to confine it to a particular day. In doing this the plaintiff in error puts quite out of view the offer in connection with which the testimony was adduced, to be found at page 106, Transcript of Record, reproduced at page 34 of our main brief. The central thought of the carrier was to show that there was a vast number of cars with which to equip shippers; and to emphasize this adequacy it proposed to show that cars stood on its tracks unused. Now to endeavor to interpret the testimony, apart from that relating to the 900 cars of April 28th, 1904, as referring to a particular day or days and to limit its purport to a very restricted period is inharmonious with the very purpose of its introduction and utterly unwarranted by the general record and by ordinary rules of construction. Indeed, if plaintiff in error wished to be frank and fair it would admit what came to light in another of the group of coal company cases, (Bulah Coal Company's case), from the mouth of its own witness, Trump, that for a stretch of six months at a time, during the very period of this action, its unused bituminous coal car equipment was stored along its tracks.

The Railroad Company's table at page 85, Transcript of Record, but begs the whole question. Apart from all other considerations it assumes both a right and a necessity to make a pro rata allotment during a period of normal trade and transportation conditions, and it bases its pro rating, as appears by the cross-examination of the witnesses, upon a system condemned by the Interstate Commerce Commission and this Court.

In our main brief we have treated sufficiently of the motives and the methods that brought about the use of

the Berwind and the Keystone cars at the Sonman mine. Nothing brought forth in the "Reply Brief" requires further reference to this feature.

At page four of the plaintiff in error's reply brief, we find an extract from a letter of the Railroad Company's General Superintendent of Transportation. Comment thereupon we regard as superfluous, as the writer of the brief has not seen fit to indicate in what connection the letter is used, when written, or where it may be found in its entirety.

The plaintiff's case discloses the following indisputable facts:—

(1) That the plaintiff below had a large and productive coal mine, amply equipped to produce a large tonnage, located on the line of railroad of defendant below, with a market for the productive capacity of the mine.

(2) That during the period of the action it consistently and persistently demanded from the Railroad Company for the shipment of its coal, cars substantially to the rating of its mine.

(3) That the Railroad Company had an adequate supply of cars during the period of the action sufficient to furnish the plaintiff below with the cars it ordered; this not only being a matter in effect admitted by the carrier in its proofs, but found as a fact by the jury upon submission of the question to it by the trial Court in his charge. (Transcript of Record, page 95).

(4) That the defendant below consistently and persistently refused and neglected to furnish the cars so ordered, a fact amply shown by the Coal Company and the records of the Railroad Company as well, and neither denied nor excused by the carrier.

(5) That the cars ordered by the Coal Company were requisitioned without regard to destination.

(6) That by the refusal of the Railroad Company to furnish cars ordered the plaintiff below sustained damages in the sum of \$145,830.25, as found by the jury.

"B"

As the defendant in error views this case the only question that can arise in this Court upon the established facts of the cause is whether the State Court had jurisdiction to redress the wrong suffered. All the assignments of error with the exception of the ninth in whole or in part go to the question of jurisdiction, and the ninth is not unrelated thereto.

Plaintiff in error's contention at the trial and in the State Supreme Court was that because a portion of the traffic would have been interstate and because it was an interstate carrier, a Federal Tribunal, either the Interstate Commerce Commission or a Federal Court (and the Railroad Company was very particular not to designate which) had exclusive jurisdiction of the controversy.

Defendant in error contended and still contends that it is not seeking to recover by force and effect of any Federal statute or Federal Law, but by force and effect of the Common Law of Pennsylvania, which at all times heretofore had declared the right and provided the remedy sought by it.

It will be observed that nowhere in the record is there proof or offer of proof on behalf of the Railroad Company that it observed any rule laid down by Act of Congress or by ruling of the Interstate Commerce Commission, in its delivery of coal cars to the Company.

The case, therefore, resolves itself into one of arbitrary wrong on the part of the plaintiff in error, a wrong that was equally flagrant, both before and since the passage of the Act to Regulate Commerce, that is independent of that Act and in nowise inconsistent therewith, and the remedy now invoked was always available in the State Courts, we contend.

Did, then, the plaintiff Coal Company have the remedy invoked prior to any legislation by Congress on

8 Supplemental Brief of Defendant in Error.

the subject of Interstate Commerce? Both State and Federal tribunals have answered in the affirmative, and they have said that by the 22nd Section of the Interstate Commerce Act the remedy is expressly preserved.

As this Court said in

Pennsylvania Railroad Company vs. Puritan Coal Mining Company,
237 U. S., 121,

"Such suits, (there referring to rule violation), though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal Courts."

To the same effect is the pronouncement of this Court in

Pennsylvania Railroad Company vs. Clark Brothers Coal Mining Company, U. S. Adv. Ops., 1914, page 896-902,

where it said that

"so long as the creative provisions of the Federal Act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes."

And as showing that the instant case is on all fours with the Puritan case, supra, we have the following extract from the latter:

"It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a *suit for a breach of the carrier's law duty to furnish cars*, or an action for damages for the carrier's unjust discrimination."

****In either case the liability is the same.* For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been in a sense a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the Court is defeated because the breach of duty is also called a discrimination."

Illinois Central Railroad Co. vs. Mulberry
Hill Coal Co.,

U. S. Adv. Op., 1914, page 760, 763,

is also on all fours with the case at bar, the only distinction being that failure to perform a common-law duty is the gist of the action in the Sonman case, whereas in the Mulberry Hill case the failure was in the non-performance of a statutory requirement declaratory of the common-law duty.

And what this Court there said, we respectfully submit, is peculiarly pertinent here to wit:

"There is nothing in the amendments introduced by that Act (Hepburn Act of 1906) to affect the jurisdiction of the State Court in an action such as the present."

In our main brief we have at some length elaborated the thought that the Hepburn amendment does not in the least deprive the State Courts of jurisdiction in such cases as the one at bar.

Even if the Hepburn Act were purely creative in its scope, instead of declarative of the common-law, there is no issue made by the pleadings of the Railroad Company that the requests made by the Coal Company for transportation facilities were anything but reasonable. Neither is there anything in the record to show that at any time the Pennsylvania Railroad Company advised the Coal Company that its requests for cars were unreasonable; that an exceptional movement of cars off its lines caused a shortage that created the deficiency in its supply; that there was any unusual or unexpected call for cars. On the contrary, the record shows just the reverse. For example, at page 35, Transcript of Record, we find the following reply from the Railroad Company to a complaint by the Coal Company as to car supply:—

"PENNSYLVANIA RAILROAD COMPANY,

Pennsylvania Railroad Division
Office of General Superintendent.

G. W. Creighton.

Altoona, Pa., February 3, 1904.

Mr. Vance McCormick, Treasurer. Sonman
Shaft Coal Co., Harrisburg, Penna.,

Acknowledging your favor, February 1, relative
to the distribution of cars. It is true that the number
delivered to your operations during the month of
January was a little short of their proportion. We
have arranged to make up this shortage, at the ear-
liest moment.

G. W. Creighton,
General Superintendent."

In this respect the Sonman case closely resembles

Eastern Railway Co. vs. Littlefield, 237 U. S., 140,
decided the same day as the Puritan case.

The Sonman case is even stronger, for in the Little-
field case, the carrier in its answer set up the defense
that the coal company's demand for cars was unreason-
able, that an unprecedented rush of settlers created an
unprecedented demand for transportation facilities, that
there was a car shortage throughout the country and to
have complied with plaintiff's demands would have
brought about discrimination against others.

What was said by this Court in the Littlefield case,
supra, applies here as well, to wit:

"That liability (the carrier's) cannot now be avoid-
ed by proof that the failure to furnish cars was occa-
sioned by a shortage for which the carriers may not have
been responsible, but as to which they failed to give
timely notice to the shipper."

A fortiori, is the Court's observation pertinent here,
when it is recalled that at the trial of the Sonman case
the carrier showed an abundance of cars available, that
in fact it had surplus cars at periods in storage along its
line.

The endeavor of the plaintiff in error to make out

that the Hepburn Act precludes the right of recovery in the instant case and its effort to show at the trial that certain cars were off its line, the latter proposition being discussed at page 40 of our main brief, are of a stripe. No such points were ever raised with the Coal Company during the years of its maltreatment, no such excuses were ever offered. The carrier simply did what it chose to do in the way of car supply, arbitrarily and by main force. Neither does any plea, any answer, any motion to dismiss interposed by the carrier by way of defense suggest such propositions. An observation in an opinion of this Court in a railway case-

McCarthy vs. Ohio & Mississippi Railroad Co.,
96 U. S., 258,

applies here with great force. The railway company there first contended that it failed to forward cattle on Sunday for the want of cars, and then made a question about the illegality of a Sunday shipment. Referring to the latter contention, the Court said:

"This point was an afterthought suggested by the pressure and exigencies of the case."

In McCarthy vs. Railway Co., *supra*, this Court also effectually disposes of the contention here made by the carrier that the trial Court erred in excluding the offer to show that certain cars were off the carrier's lines in interstate traffic. As appears in our main brief, the carrier had already shown that it possessed an abundance of cars. The inconsistency of the two positions makes applicable the declaration of this Court in the McCarthy case that the litigant,

"Cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

But in any event plaintiff in error was not prejudiced in the slightest by the exclusion of its offer to show that *during the entire period of the action* cars were off its lines that, except for such fact, would have been

12 Supplemental Brief of Defendant in Error:

available for distribution to the Sonman mine among others. The avowed object of this offer was to demonstrate that there was a sufficient car equipment owned by the Pennsylvania Railroad Company. But the trial Court in his instructions to the jury conditioned a recovery by the Coal Company upon five postulates. The fifth of these required the jury to find as a fact "that the conditions of the bituminous coal trade were normal and *that the defendant company had a generally ample car supply for the needs of the coal business in normal times and under normal conditions.*" (Transcript of Record, page 95)

Clearly, the jury found as a fact the very thing that the carrier wished to present in another way, and by cumulative testimony, that the carrier's equipment was ample. The jury having determined that with an ample car equipment on hand, the carrier had unlawfully failed to provide the Coal Company with shipping facilities, what boots it that the admission of the excluded testimony would have enabled the carrier to show that it possessed an even *ampler* car equipment?

We respectfully submit that the judgment should be affirmed.

A. L. COLE,

A. M. LIVERIGHT,

Attorneys for Defendant in Error.

(23,924)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 289.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF
IN ERROR,

vs.

STINEMAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, Appellant, and Stineman Coal Mining Company, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction

2 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, E. D. Penna.]

W. W. CRAIG,

*Clerk District Court United States,
Eastern District of Pennsylvania.*

Allowed by—

D. NEWLIN FELL,

*Chief Justice of the Supreme Court
of the State of Pennsylvania.*

3 Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The Title Guaranty and Surety Company, as sureties, are held and firmly bound

unto the Stineman Coal Mining Company, in the full and just sum of Thirty thousand (30,000) dollars, to be paid to the said Stineman Coal Mining Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, between The Pennsylvania Railroad Company, appellant, and the Stineman Coal Mining Company, appellee, a judgment was rendered against the said The Pennsylvania Railroad Company, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stineman Coal Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

4

THE PENNSYLVANIA RAILROAD
COMPANY,

By GEO. D. DIXON,

[SEAL.]

Vice-President.

Attest:

LEWIS NEILSON, [SEAL.]

Secretary.

Sealed and delivered in presence of—

JOS. RICHARDSON,

As to G. D. D.

GEO. F. NORTON,

As to L. N.

THE TITLE GUARANTY & SURETY
COMPANY,

By HARRIS J. LATTA,

[SEAL.]

Resident Vice-President.

Attest:

WILLIAM RARICH,

Resident Assistant Secretary.

Approved by—

D. NEWLIN FELL,

Chief Justice Supreme Court of Pennsylvania.

5. UNITED STATES OF AMERICA, ss:

To Stineman Coal Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, 1776.]

D. NEWLIN FELL,
*Chief Justice of the Supreme Court
of the State of Pennsylvania.*

COMMONWEALTH OF PENNSYLVANIA,

County of Clearfield, ss:

On this third day of July, in the year of our Lord one thousand nine hundred and thirteen, personally appeared James P. O'Laughlin before me, the subscriber, Prothonotary and Clerk of the Court of Common Pleas of Clearfield County, Pennsylvania and makes oath that he delivered a true copy of the within citation to Alfred M. Liveright of the attorneys of record for the said Stineman Coal Mining Company, and read the original to said Liveright.

JAMES P. O'LAUGHLIN.

Sworn to and subscribed the third day of July, A. D. 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE,
Proth'y & Clerk of the Court.

6 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania:

The Pennsylvania Railroad Company, the appellant in the above entitled action, respectfully shows:

The plaintiff, a shipper of bituminous coal over the lines of your petitioner, obtained a judgment in the Court below because of the alleged failure of your petitioner to deliver to it all the cars which it asserted it would have received had your petitioner made a proper allotment and distribution of those which it had available for distribution among its shippers, and this judgment has since been affirmed by the Supreme Court of Pennsylvania, and a final judgment in said action consequently obtained by the plaintiff therein.

As disclosed by the Record of the case, during the period of the action the defendant was engaged in interstate commerce or transportation, and the bituminous coal transported by it was transported to points both within and without the State of Pennsylvania. Its coal cars were used indiscriminately for intra and interstate shipments, and in making distribution thereof among its shippers, your petitioner made but one distribution, the cars delivered to the shippers being available at their option for shipments to points either within or without the State.

The plaintiff shipped to points both within and without the State, and the additional shipments which it would have made had additional cars been available would have been so made.

6½ Both in the Court below and in the Supreme Court of Pennsylvania your petitioner, as the Record discloses, contended that in making distribution of its coal cars it was subject to the provisions of the Acts of Congress, known as the "Interstate Commerce Acts," and to those alone, and that consequently actions based upon alleged failure to make proper and lawful distribution of its cars were not cognizable in State Courts, but only in the Federal tribunals, this being the result, as your petitioner contended, of the provision contained in Section 9 of the said Interstate Commerce Act, to the following effect:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction."

The contention thus made and advanced upon the part of your petitioner was overruled by the Court below, and also by the Supreme Court of Pennsylvania.

It further appeared from certain orders of the Interstate Commerce Commission which, as the Record in the case discloses, were given in evidence, that that body had defined and prescribed the character and method of distribution of their cars to be observed and pursued by carriers subject to the provisions thereof, and it was stipulated by the parties to the cause that if the method of distribution prescribed in and by said orders was that which should have been observed by your petitioner in the period of the action, the plaintiff was not entitled to recover, but, on the contrary, the verdict should be in favor of your petitioner. Such stipulation further provided that if the method prescribed in said orders was not that which should have been observed and followed by your

petitioner, then the verdict should be in favor of the plaintiff in the action.

Your petitioner both in the Court below and in the Supreme Court of Pennsylvania contended that by virtue of the provisions of the said Interstate Commerce Acts, the method of distribution prescribed and defined in and by said orders of the Interstate Commerce Commission was the lawful and proper one, and that consequently under the stipulation aforesaid, it was entitled to a verdict in its favor. This contention the Court below overruled, and directed that a verdict should be entered in favor of the plaintiff, and its action in this respect has been approved by the Supreme Court of Pennsylvania, and the judgment entered in the Court below upon said verdict has been affirmed by the said Supreme Court.

As a result of the overruling of the contentions thus advanced upon behalf of your petitioner, a final judgment has been entered against it in a case in which the decisions of both the lower Court and the Supreme Court of Pennsylvania have been against a right, privilege or immunity claimed and asserted by your petitioner under the Constitution and Statutes of the United States, and in favor of an authority exercised under and pursuant to a law of the State of Pennsylvania, notwithstanding the contention of your petitioner that such authority was not properly exercisable on the ground of its repugnancy to the Constitution and laws of the United States.

Your petitioner, being desirous of having such final judgment reviewed by the Supreme Court of the United States, prays that a writ of error for this purpose may be allowed.

And it will ever pray, etc.

[Seal The Pennsylvania Railroad Company, Incorporated
1846.]

THE PENNSYLVANIA RAILROAD
COMPANY,

By GEO. D. DIXON, *Vice-President*.

Attest:

LEWIS NEILSON, *Secretary*.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Company, the petitioner herein, and that the facts contained and set forth in the above and foregoing petition are true to the best of his knowledge, information and belief.

LEWIS NEILSON.

Sworn and subscribed before me this first day of July, 1913.

[Seal Henry E. Cain, Notary Public, Philadelphia, Pa.]

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

[Endorsed:] No. 53. January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Stineman Coal Mining Company vs. Pennsylvania Railroad Company. Petition for Allowance of Writ of Error to Supreme Court of the United States. Francis I. Gowen.

8 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
 VS.
 STINEMAN COAL MINING COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specifications of Error.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same."

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:

"1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals."

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:

"2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant."

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

"4. Under the law and the evidence the plaintiff is not entitled to recover."

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"5. The Court below erred in overruling the defendants' motion for judgment non obstante veredicto."

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"6. The Court below erred in entering judgment on the verdict in favor of the plaintiff."

FRANCIS I. GOWEN,
H. W. B.,
Attorney for Plaintiff in Error.

[Endorsed:] No. —. — Term, 1913. In the Supreme Court of the United States. Pennsylvania Railroad Company, Plaintiff in Error, vs. Stineman Coal Mining Company, Defendant in Error. In Error to the Supreme Court of Pennsylvania. Specifications of Error. Francis I. Gowen.

10 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Upon the representation of counsel it appearing that the Clerk of this Court will not be able to prepare and complete the Transcript of Record in this case within the time limited in the citation, it is hereby this — day of July, 1913, ordered that the time for filing said Transcript of Record in the Supreme Court of the United States be, and the same is, hereby extended until the fifteenth day of October, 1913.

D. NEWLIN FELL.

11 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement.

The Stineman Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action, alleges as follows, viz:

First. That the Stineman Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the 1st day of April A. D., 1902, to the 1st day of January A. D.,

1905, was the owner of a leasehold upon a large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places within the territorial limits of Pennsylvania.

Second. That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1846, [1846] and is by virtue of the laws and constitution of the said State, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage or shipment from points and places within the State of Pennsylvania, to other points and places within the said State, and was and is engaged in carrying, hauling and transporting bituminous coal from points and places along its main line and branches within said State, to other points and places within said State.

Third. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situated along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April A. D., 1902, to the 1st day of January A. D., 1905, was shipped over said main line and branch of the defendant
12 company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places within the State of Pennsylvania.

Fourth. That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine, and publish the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

Fifth. That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant had for daily distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice,

in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said company five hundred (500) cars before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for said unjust, undue and unreasonable discrimination in favor of the said Berwind-White Coal Mining Company.

Sixth. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate markets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines, to points and places within the State of Pennsylvania.

Seventh. That during all of said period of time, to wit, from the 1st day of April, A. D., 1902, to the 1st day of January, A. D., 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal, in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 18,321 tons, which it would have sold to its customers therein at prices F. O. B. cars above costs of producing same; but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That because of said undue

and unreasonable discriminatory acts, the plaintiff suffered
 14 damage and loss in its business of mining and selling its product in the markets of the soft coal trade and in points and places and to consumers of soft coal within the lines of the State of Pennsylvania, and it, therefore, brings this action to recover compensation for said loss and damage in the sum of \$13,899.61 Dollars.

Second Cause of Action.

For a second and separate cause of action, plaintiff repeats and renews each and every allegation contained in the preceding parts of this complaint, in which are averred certain discriminatory acts of the defendant company, with the same force and effect as though here again stated fully and at length, and further alleges:

(a) That the plaintiff's colliery or mine is situated along the main line of defendant company's railroad or highway, west of Altoona and east of Johnstown, and that along said main line of defendant's highway or railroad west of Altoona and east of Johnstown, were the collieries or mines owned and operated by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company during the period of time, viz., from the 1st day of April A. D., 1902, to the 1st day of January A. D., 1905, the period of time covered by this action, and that the colliery or mine of the plaintiff and the said collieries and mines of the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company are connected with the defendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies named; that in the regular course of business, it was the practice of the defendant company during all of said period to deliver empty cars at the junction of its railroad with the railroad or branches leading to the several mines or collieries of the plaintiff and of the above named other companies, and for the respective owners of said mines or collieries to haul with their own motive power the empty coal cars to their respective mines to be loaded, and when loaded

15 to haul them back and deliver them to the defendant at the point of connection where they were received from the defendant for transportation. That the service so rendered by the plaintiff and the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, was of a like and contemporaneous kind, of a like kind of traffic under substantially similar circumstances and conditions.

(b) That the defendant without the knowledge of the plaintiff allowed and paid to the said Altoona Coal & Coke Company and Glen White Coal & Lumber Company, directly or indirectly to other person or persons, for the benefit and use of said companies during all of the period of time aforesaid, the sum of fifteen (15) cents per ton, on all of the coal and coke which said companies respectively hauled and delivered from their said collieries and delivered to the defendant for transportation over its main line and connecting lines, but did not pay to the plaintiff any sum whatsoever for or on account of the coal which it in like manner, under like circumstances and under similar conditions delivered to the defendant for transportation over its main and connecting lines.

(c) That during the aforesaid period of time, the plaintiff hauled from its mine and delivered to the defendant for transportation to market, to points and places within the State of Pennsylvania, upwards of 44,971 tons of coal, and for the services so rendered the plaintiff is in like manner as the aforesaid Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, entitled to receive from the defendant company, the sum or price of fifteen (15) cents per ton. That to the extent of the payment aforesaid made to said companies, the defendant has unduly and unjustly discriminated against the plaintiff and in favor of said companies, and has violated its duty to plaintiff as a common carrier, and caused the plaintiff to suffer damage and loss in the sum of

16 \$6735.65, in addition to the damage and loss set forth in the preceding part of this statement, and the plaintiff seeks in this action, therefore, under the two causes of action set forth to recover the sum of \$20,635.26, as its compensation for the loss and damages incurred.

STINEMAN COAL MINING CO.,
By KREBS & LIVERIGHT, Attorneys.

Filed Nov. 21, 1908. Roll B. Thompson, Prothontary.

17 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Motion for Leave to File Amended Statement.

Opinion.

Defendant objected to the allowance of the amendment asked for, for the following reasons: "First. That the changes introduced by plaintiff's proposed amended statement are not authorized by the statutes of amendments. Second. Because said amended statement proposes to introduce new causes of action from those averred and set forth in plaintiff's original statement. Third. Because said proposed amended statement embraces new causes and grounds of action not averred and set forth in plaintiff's original statement and this after the bar of the statute had intervened upon all the causes of action averred in plaintiff's original statement. Fourth. For the same reasons the defendant excepts to the application to amend the præcipe and writ."

The amended statement followed the allowance by the Court of the amended præcipe and writ so as to state the amount of damages larger than that in the original præcipe and writ.

18 An examination of the plaintiff's amended statement convinces us that the third clause thereof does introduce a new cause of action and it being more than six years since the right of action accrued that amendment, so far as covered by said third clause, cannot be allowed. The original statement declares wholly on discriminatory acts of the defendant, naming the persons and corporations in whose favor the defendant Company discriminated as against the plaintiff. The third clause of the amended statement declares wholly not upon discrimination but upon a violation of its constitutional, statutory and common law duty of furnishing, "an adequate and sufficient number of cars to meet its requirements." The amendment, so far as said third clause is concerned, is, therefore not allowed.

The balance of the amended statement follows in language the original declaration, except, first, as to excluding in several clauses thereof words and sentences respecting haulage or shipments made to points and places within the State of Pennsylvania; and second, in elaborating the results of alleged discrimination and in setting up a very much larger discriminatory tonnage of coal and in consequence a very much larger claim for damages. At first blush it would seem as though the amended statement were an attempt to declare for coal belonging to that class of tonnage traffic called interstate, while the original declaration, in using the words confining it to shipments within the State of Pennsylvania, confined recovery to that class of tonnage traffic known as intrastate. The learned Counsel for plaintiff, however denies such purpose or intention, and it is clear that the law will not permit a recovery for interstate shipments, so that even though the amendment were allowed any attempt to recover for distinctively interstate shipments will not be allowed by the Court on trial. In other words, the amendment will not avail them for such purpose. The words with reference to the State of Pennsylvania in the original statement, are excluded from the amended statement it is claimed 19 merely because they are surplusage. With this view of the case there perhaps is no harm in allowing the amendment so far as the exclusion of the reference to the State of Pennsylvania is concerned.

The principal objection made by the learned Counsel for the defendant to the statement is, that a new cause of action is introduced by the amended section eighth, corresponding to section seventh of the original statement. A careful examination of both statements convinces us that no new cause of action is in fact declared on. In both, two particular acts of discrimination are alleged, namely, first, the distribution to Berwind-White Coal Mining Company daily of 500 cars before any distribution made of a pro rata to the plaintiff Company; and second, the sale by the defendant Company to Berwind-White Coal Mining Company of 1000 steel cars of large capacity, thereby depriving the plaintiff of its pro rata percentage of said cars. Both statements cover the same period of time and allege identically the same discriminatory acts. In the original statement, however, plaintiff alleges a certain definite number of tons of coal which it could have shipped in excess of what it did ship, being prevented so to do by reason of the alleged two undue and unreasonable acts of discrimination in favor of Berwind-White Coal Mining Company. In the amended statement, although in somewhat different language, the same allegation is made, that is, that it could have mined and shipped a large amount of coal in excess of what it did mine and ship and claims for the profit thereon as in the original statement except that it claims for a very much larger amount of tonnage which it was deprived from shipping by reason of the discriminatory acts of the defendant and in consequence declares for a much larger sum of money. We are of opinion, therefore, that all that portion of the amended statement exclusive of section three is allowable. The cause of action, in our judgment, is

the same, that is, two certain alleged discriminatory acts. The amendment appears to declare merely on the consequences of those discriminatory acts and alleges aggravation of the injury, in that they were prevented from shipping a larger amount of tonnage and therefore entitled to a larger amount of damage than was claimed for in the original statement.

20 In *Knapp vs. Hartung*, 73 Pa. St. 290-294 is a case almost identical in principle with the case in hand. In that case the Supreme Court reversed the lower Court for striking off amendments declaring for a number of additional items, on the ground that both statements were based on the same cause of action, namely, the breaking of the close. That case also lays down the principle that the amendment acts must receive a liberal construction. In a number of cases in Pennsylvania, where the amended statement did not vary from the original statement in an allegation as to the particular language, action or acts alleged as the basis of recovery, but where the mode of stating the complaint or of setting out the circumstances together with a statement of the consequences and aggravation of the injury sustained has been modified or amended, such amendments have been allowed by the lower Courts and sustained by the higher Courts. *Jackson vs. Gunton*, 26 Superior Court 203. *Herbstritt vs. Lackawanna Lumber Co.*, 212 Pa. St. 495. *Fredericks vs. Penna. Canal Co.*, 148 Pa. St. 317. Very recent cases recognizing this principle are *Call vs. Westinghouse Co.*, 230 Pa. St. 86 (in *Advance Reports* 17 March 1911). *First National Bank vs. Slate Co.*, 229 Pa. St. 227 (in *Advance Reports* November 18th, 1910). Amended statements increasing claim for damages are permitted. See *Tassey vs. Church*, 4 *Watts & Sargent* 141. *Clark vs. Herring*, 5 *Binney* 133. *Stainer vs. Insurance Co.*, 13 *Superior Court* 25.

The cases relied on by the learned Counsel for defendant are clear cases where the amended statement introduced new or different causes of action barred by the statute. *Allen vs. Tuscarora Valley Railroad Co.*, 229 Pa. St. 97 (in *Advance Reports* November 25th, 1910) was where the original declaration alleged negligence
21 of the defendant Company in failing to comply with its duty of furnishing car couplers of reasonable safety, while the amended declaration alleged that the defendant corporation was engaged in interstate commerce and as a common carrier so engaged failed to equip its cars as required by an Act of Congress. This was held to be introducing a new cause of action barred by the statute, and of that there can hardly be two opinions. In *Philadelphia vs. Railroad Co.*, 203 Pa. St. 38, cited by Counsel, the suit was by the City against the Railroad Company to recover the cost of paving streets occupied by the tracks of the Company. The original statement did not aver any charter, contractual or statutory obligation on the Railroad Company to pay the cost of paving the streets, and hence when the City, after the statute of limitations had run against its claim, attempted to amend its statement so as to aver that the defendant Company had by lease or merger acquired the franchises and assumed the burden of another railway company which had the obligation of paving the streets, it was held that such averment intro-

duced an entirely new cause of action. In Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co., manuscript opinion by Ferguson, J., July 13, 1910, in the Court of Common Pleas No. 3 of Philadelphia to No. 545 March Term, 1905, the attempted amendment was the introduction of other and different names of companies or corporations in favor of whom the defendant Company had discriminated as against the plaintiff Company, and hence is not this case.

Here, as before stated, two distinctive alleged discriminatory acts are averred, exactly similar in both the original and amended statements. The effect, consequences or results of those acts is made a matter of amendment and of an enlarged claim for damages. We fail to see where any new cause of action is alleged.

In this case there is a second and separate cause of action declared on, both in the original and amended statements. What has been said with respect to the first cause of action applies equally
22 to the second. The cause of action in the amended statement is the same cause of action declared on in the original statement, the only difference in the amendment being that a very much larger tonnage of coal is alleged to have been delivered to the defendant for transportation to market on which the 15 cents per ton rebate allowed to other companies is claimed.

The amended statement, exclusive of clause three, is therefore allowed and directed to be marked filed.

At request of Counsel for defendant, an exception is noted and bill sealed.

By the Court.

ALLISON O. SMITH, P. J.

Clearfield, Pa., April 13th, 1911.

Filed Apr. 13, 1911. Roll B. Thompson, Prothonotary.

23 C. P., Clearfield County, May Term 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Amended Statement.

The Stineman Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, to-wit:

First. That the Stineman Coal Mining Company is a corporation organized and existing under the Laws of Pennsylvania, and from the first day of April, A. D. 1902, to the first day of January, A. D. 1905, was the owner of a leasehold upon a large body of bituminous coal situate in the County of Cambria, State of Pennsylvania; and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom to various points and places;

24 Second. That the Pennsylvania Railroad Company is a corporation existing under the Laws of Pennsylvania by an Act of Assembly approved the 13th day of March 1846, and is by virtue of the Laws and Constitution of the said State a common carrier engaged in the transportation of passengers and property, and was and is engaged in carrying, hauling and transporting bituminous coal; and undertook and agreed, in consideration of the franchises to it granted by the Commonwealth of Pennsylvania, to give and grant unto the plaintiff the facilities necessary for the transportation of its coal to market without discrimination in favor of other companies, corporations or individuals; and to furnish it with cars and motive power without any preference to other companies, corporations or individuals; but the defendant has failed and refused to perform its duty thus imposed upon it in the manner and to the extent hereinafter narrated;

Third. That under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches, for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to the defendant's main line and branches; and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from bituminous coal regions tributary, as aforesaid, to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere; and to let and hire the same unto the plaintiff in this action. That the defendant company did not,

25 as required by law, provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations, mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market, during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and caused to be transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit:—damage in the sum of Seventy-nine Thousand One Hundred forty-one and 20/100 Dollars (\$79,141.20).

Fourth. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially of the Berwind-White Coal Mining Company, are situate along or near the line, or branch line, of the defendant company in the county of Cambria, and adjoining counties, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff, during the period from the 1st day of April 1902 to the 1st day of January 1905, was shipped over said main line and branches of the defendant company;

Fifth. That the defendant company, during all of the period aforesaid, arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and publish the capacity of its mines, and did estimate fix and determine the percentage of coal cars plaintiff was to receive each and every working
26 day at its mines for use in the carriage and transportation of its product; and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and it so fixed and determined the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines:

Sixth. That the duty and obligation of the defendant company, as a common carrier and public highway, was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number that defendant had for daily distribution; but the defendant company, disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with the pro rata share of coal cars which it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars distribute and give to said company five hundred cars (500) before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day which the percentage fixed by the defendant company entitled the plaintiff to receive, and which it would have received except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company;

Seventh. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of
27 the said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, to the said Berwind-White Coal Mining Company, one thousand (1000) Steel cars of large capacity, which it, the defend-

ant, had purchased for use in the transportation of bituminous coal, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines;

Eighth. And during all of said period of time from the 1st day of April 1902 to the 1st day of January 1905 the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had, during all of said time, constant demand and orders for its coal in excess of what could be moved in the supply of coal cars furnished by defendant company for transportation of the same to plaintiff's customers, and it could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, all of which it could and would have sold at a price aggregating f. o. b. cars, above the cost of producing same, the sum of Seventy-nine Thousand One Hundred forty-one and 20/100 Dollars (\$79,141.20); but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That said sum of \$79,141.20 aggregates the reasonable profit that plaintiff could and would have made upon the coal it reasonably could and would have shipped from its mines in the following amounts, but for defendant's discriminatory acts:—

In 1902.....	6,793 tons
In 1903.....	55,660 tons
In 1904.....	51,098 tons

and because of said undue and unreasonable discriminatory acts of the defendant hereinbefore narrated, the plaintiffs suffered 28 damage and loss in its business of mining and selling its product as hereinbefore set forth, and it, therefore, brings this action to recover from the defendant compensation for said loss and damage in the said sum of \$79,141.20 with such additional amount as will compensate plaintiff for the delay on the part of the defendant company.

For a second and separate cause of action plaintiff repeats and renews each and every allegation contained in the preceding points of this complaint, in which are averred discriminatory acts of the defendant company, with the same force and effect as though they were again stated fully and at length, and further alleges:—

"a." That the plaintiff's collieries or mines are situated along the main line of defendant company's railroad or highway, west of Altoona and east of Johnstown, and that along said main line of defendant's highway or railroad west of Altoona and east of Johnstown were the collieries or mines owned and operated by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, during the period of time from the 1st day of April 1902, to the 1st day of January 1905, the period covered by this action; and that the collieries or mines of the plaintiff and the said collieries and mines of the said Altoona Coal & Coke Company and the Glen White Coal & Lumber Company are connected with the de-

fendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies named; that in the regular course of business it was the practice of the defendant company, during all of said period, to deliver empty cars at the junction of its railroad with the railroad or branch leading to the several mines or collieries of the plaintiff and of the above named other companies and for the respective owners of said mines or collieries to haul with their own motive power the empty coal cars to the respective mines to be loaded, and when loaded to haul them back and deliver them to the defendant at the point of connection where they were

29 received from the plaintiff for transportation. That the service so rendered by the plaintiff, and by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, was of a like and contemporaneous kind, of a like kind of traffic under substantially similar circumstances and conditions;

"b." That the defendant, without the knowledge of the plaintiff, allowed and paid to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, directly or indirectly to other person or persons for the benefit and use of said Companies during all of the period of time aforesaid, the sum of fifteen cents (15¢) per ton on all of the coal and coke which said companies respectively hauled and delivered from their said collieries and delivered to the defendant for transportation over its main line and connecting lines; and did not pay to the plaintiff any sum whatsoever for — on account of the coal which it in like manner, under like circumstances and under similar conditions, delivered to the defendant for transportation over its main and connecting lines;

"c." That during the aforesaid period of time, the plaintiff hauled from its several mines, so situate as aforesaid, and delivered to the defendant for transportation to market, 552,288 tons of coal, and for the service so rendered the plaintiff is, in like manner as the aforesaid Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, entitled to receive from defendant company thereupon the sum or price of fifteen cents per ton. That by reason of the payments aforesaid made to said companies similarly situated to plaintiff, and the failure and refusal of the defendant to make like payments to the plaintiff, the defendant has unduly and unjustly discriminated against the plaintiff and in favor of said other companies, and has violated its duty to plaintiff as a common carrier, and caused the plaintiff to suffer damage and loss in the sum

30 of \$82,843.20, in addition to the damage and loss set forth in the preceding part of this statement; and the plaintiff seeks in this action, therefore, under the causes of action set forth, to recover from the defendant the sum of One Hundred Sixty-one Thousand Nine Hundred Eighty-four and 40/100 Dollars (\$161,984.40), with compensation for delay from the date of the injuries committed.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Filed April 13, 1911. Roll B. Thompson, Prothonotary.

31

May Term, 1908, C. P., Clearfield County.

No. 222.

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Plea.

Now April 17, 1911, defendant by its attorneys hereby pleads the statute of limitation as to all of plaintiff's claim not covered by its original statement.

(Signed)

MURRAY & O'LAUGHLIN,
Solicitors for Defendant.

Filed April 17, 1911. Roll B. Thompson, Prothonotary.

32

May Term, 1908, C. P., Clearfield County.

No. 222.

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Motion to Dismiss Action for Want of Jurisdiction.

The Pennsylvania Railroad Company, the Defendant in the above entitled action, respectfully moves the Court to dismiss the same, except as to the second cause of action set forth in plaintiff's statement, for the following reasons:

1. It is a corporation organized and existing under the laws of the State of Pennsylvania, owning and operating a line of
33 railroad in that State and also in the States of New York and New Jersey, and is engaged in the transportation of passengers and freight between points in said States, and is, therefore, subject to the provisions of the Act of Congress, approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto.

2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be

made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments.

3. During the period of the action and prior thereto it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether these destinations were points beyond or within the State of Pennsylvania.

4. The Acts to Regulate Commerce above referred to by their terms prohibit unlawful or unjust discrimination in the distribution by any railroad company subject to their provisions of its 34 available equipment, and your petitioner is advised by counsel, and therefore avers, that by reason of the paramount authority possessed by the Congress of the United States in respect to any matter concerning which it is empowered to legislate, the provisions of the said Acts in relation to such discrimination are controlling, and that the remedies for violation thereof which are prescribed in and by said Acts are consequently exclusive of all others.

5. It results from this, as your petitioner is advised and avers, that action for the recovery of damages based upon disregard of provisions of the said Acts prohibiting discrimination in the allotment or distribution by a railroad company or carrier of any of its equipment are cognizable solely in the tribunals which the said Acts designate and prescribe as those in which such actions shall be maintained, and these tribunals are the Courts of the United States and the Interstate Commerce Commission, jurisdiction between the two being apportionable as prescribed in the said Acts.

6. Wherefore, your petitioner showing that this Court is without jurisdiction to entertain the present action, prays that an order may be made dismissing the same.

THE PENNSYLVANIA RAILROAD COMPANY,
By W. H. MYERS, *Vice-President*.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says: That he is the Secretary of the Pennsylvania Railroad Company, the defendant in the above entitled action. That the 35 facts set forth in the above motion are true, and that the said motion has not been made for the purpose of delay.

LEWIS NEILSON.

Sworn and subscribed before me this 20th day of May, A. D. 1911.

H. E. CAIN,
Notary Public.

Commission expires February 21, 1913.

Filed June 5, 1911. Roll B. Thompson, Clerk.

36

C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Answer to Rule to Dismiss Action.

To the Honorable Allison O. Smith, President Judge:

The plaintiff, Stineman Coal Mining Company, making answer to the rule in the above case, and to the matters averred in the petition on which it is founded, respectfully says:

1. The matters set forth in paragraph one are believed to be true, and those alleged in paragraphs two and three of the petition are purely defensive and not material at this stage of the cause, even if true. Their truth can be determined only on the trial.

2. That the force and effect of the Act to Regulate Commerce, approved February 4, 1887, and the supplements and amendments thereto, in no way concern this case at this stage, and the attempt by defendant to interject the same is palpable design to confuse.

3. That the matters averred in the fifth paragraph of the
37 petition are purely academic, and assume a state of facts to exist that is not yet proven, and cannot be in proof until trial had.

4. That it denies that this Court is without jurisdiction to entertain the present action, and avers that the allegations of the petition are entirely matters of defense after plaintiff's testimony shall have been presented.

5. That defendant's entire petition is premature and without warrant of law, is an effort to have the Court prejudge the case without any proofs having been made therein, seeks to have the Court give binding instructions for defendant without a jury even sworn, and is otherwise irregular.

6. That the Act of Congress of February 4, 1887, and its supplements and amendments do not and cannot apply to the matters for which suit is brought in this action.

7. That even if the allegations of fact contained in the petition were true as stated, defendant has shown nothing thereby to defeat the jurisdiction of the Common Pleas of Clearfield County.

Wherefore the plaintiff moves the Court to discharge the rule herein granted.

[CORP. SEAL.]

STINEMAN COAL MINING CO.,
LEON WALKER, *Secretary.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Leon Walker, being duly sworn according to law, deposes and says that he is the Secretary of the Stineman Coal Mining
38 Company; that the matters of fact set out in the above answer are true, and the matters of law therein stated he is advised are true.

LEON WALKER.

Subscribed and sworn before me this 14th day of June, 1911.

LEWIS H. VAN DUSEN,
Notary Public.

Commission expires March 2, 1915.

Filed June 16, 1911. Roll B. Thompson, Prothonotary.

39 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Sur Motion and Rule to Dismiss Action.

Opinion.

The action in trespass docketed to the above stated number and term was begun March 26, 1908, and plaintiff's Statement filed November 21st, of that year. On December 18, 1908, plaintiff served rule on defendant to plead within thirty days, and no plea being entered, on March 10, 1909, the Prothonotary entered plea of not guilty, as per Rule of Court. At September and December Terms, of 1910, the case was on the trial list and continued. On April 3, 1911, leave was granted by the Court, on motion, to amend the præcipe and writ enlarging claim, and on April 13, 1911, an amended statement was filed, to which the defendant, on April 17th, filed exceptions and also a plea of the statute of limitations as to that portion of the claim in excess of the original statement. The case was again on the trial list for May Term, continued first until July 10th and later continued generally. On June 5, 1911, defendant presented petition to dismiss, upon which the pending rule
was granted.

40 Said petition alleges, inter alia, in paragraphs second and third as follows:

"2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with

such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments."

"3. During the period of action and prior thereto it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether those destinations were points beyond or within the State of Pennsylvania."

Paragraphs one, four and five, allege the existence of the defendant corporation as one organized under the laws of the State of Pennsylvania, operating in said State and other States, subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce." That by the provisions of said Act and its supplements, prohibiting unlawful and unjust discrimination in the distribution of equipment by
41 railroad companies, said defendant company is subject to control by the Federal Courts exclusively, and that owing to said exclusive Federal control this Court is without jurisdiction in the cause of action sued on.

This proceeding is somewhat new to Pennsylvania practice. If treated from a technical standpoint, the Rule could readily be discharged for several reasons. Both as a plea in abatement and as a demurrer it comes too late, as will be seen by the above recital of the record. Under our Rule of Court a plea in bar has been entered and under all the authorities after such entry a plea in abatement is too late. *Good Intent Stage Co. vs. Hartsell*, 122 Pa. St. 277. *Daley vs. Iselin*, 212 Pa. St. 279. The plea to the general issue was regularly entered by the Prothonotary under our Rules of Court after a Rule served on the defendant to plead. It is, therefore, a regular plea in bar.

Technically also it cannot stand as a demurrer, because a demurrer admits all the facts of the declaration. A demurrer cannot raise collateral matter and set up other or new facts on which it relies to oust the action. As a demurrer this petition would be what is called a speaking demurrer, in that it sets up facts outside of the matters set forth in the declaration as a ground for defeating the action. Moreover as a demurrer it comes too late because presented after a plea to the general issue has been filed. *Allwein vs. Brown*, 29 Superior Court 331. Therefore, either as a plea in abatement or as a demurrer, or treated as a combination of both, the Rule in this case should be discharged as coming too late.

The question raised in the petition, however, is in effect a plea to the jurisdiction. It alleges exclusive jurisdiction of the subject matter of the suit in the Federal Courts or before the Interstate Commerce Commission under the Federal Act regulating that subject. Objection to the judicial power of a court of course may be taken advantage of at any stage of the case, even on appeal.

Want of jurisdiction of the subject matter is an inherent and
42 incurable defect which cannot be waived by any acquiescence of the parties and can be raised at any stage of the proceedings in which such want of jurisdiction properly appears either in the pleadings or in the evidence offered in course of trial. As a plea, however, it is said to have no place in our jurisdiction. Troubat and Haly's Practice, Vol. 1, 5th Edition, page 282, Section 513. Is then the question of jurisdiction raised by this petition and the rule granted thereon properly before the Court at this time? We prefer to treat it in this way rather than technically as a plea in abatement or as a demurrer. In our view, while as a plea in abatement or as a demurrer it comes too late, as a plea to the jurisdiction it comes too early. In effect it assumes facts which are not now before the Court. Paragraphs two and three of the petition allege a certain state of facts which do not appear in any of the pleadings and would be the subject of proof. These facts are substantive as a defense in behalf of the defendant and as such must be proved as facts. The question raised, therefore, by this petition is one which can doubtless be interjected as a defense either at the close of the plaintiff's case, if the facts therein are brought out on cross-examination, or at the close of the defendant's case as a matter of distinct proof of such defense. If, as a question of law, the Interstate Commerce Act of Congress, approved February 4, 1887, entitled "An Act to regulate commerce," confers sole and exclusive jurisdiction on the Federal Courts and upon the Interstate Commerce Commission as to acts of discrimination in the distribution of railroad equipment to shippers, that is a legal proposition which can only be passed on by the Court when it is shown that the defendant railroad is engaged "inter alia, in transporting interstate commerce coal" as well as in transporting coal wholly within the state for the plaintiff or other owners and operators, as alleged in paragraph two of the petition. Paragraph three of the petition also alleges the existence of certain regulations "for
43 the distribution of its coal cars among shippers desirous of using the same" and that such distribution was without regard to whether such shipper wanted it for intrastate or interstate shipments. Such allegations are clearly matters of fact subject to proof and cannot be taken for granted on mere petition and answer. The question of jurisdiction, therefore, raised by this proceeding is prematurely raised.

The plaintiff's statement does not allege or aver anything with respect to interstate commerce or that any of its coal trade is without the State. It does not claim and cannot of course claim under the authority of cases already tried in this Court and approved by the Appellate Courts for any coal shipped by the plaintiff to points

without the State. As a plea or proceeding, whatever it may be named, for raising the question of jurisdiction we regard it as premature and the Rule should be discharged for that reason alone.

We prefer not to enter at length upon the merits of the controversy as to jurisdiction at this time. The right of a plaintiff to recover under the Pennsylvania discriminatory acts has been clearly recognized by the Appellate Courts of Pennsylvania. In *Wright vs. Baltimore & Ohio R. R. Co.*, 32 Superior Court 5, as appears in the charge of President Judge Kooser, the question of jurisdiction and of the right of a plaintiff to recover for shipments wholly within the State of Pennsylvania was squarely raised and the judgment of the lower Court affirmed by the Appellate Court. In a case from this County, *Hillsdale Coal & Coke Company vs. Pennsylvania Railroad Company*, 229 Pa. St. 61, one of the principal defenses, at least indirectly, raised the question of jurisdiction. The position taken by the trial Judge, permitting a recovery for a percentage of the business of the plaintiff company shown to have been within the State of Pennsylvania, was affirmed by the Supreme Court and the language of Mr. Justice Potter, on page 67, would indicate that the question of jurisdiction was clearly in mind in affirming the

44 position taken by the lower Court. The language there used, when he says, "the Interstate Commerce Commission would have no jurisdiction over a claim for damages sustained in connection with commerce wholly within the state, and therefore the suit pending before that body could not affect the plaintiff's right to recover for the damages here claimed," would clearly indicate the mind of our highest Appellate Court that there is a dual right to recover for the two classes of business, namely, intrastate and interstate. The Pennsylvania Constitution, as well as certain statutes based thereon, have provided for the punishment of certain undue and unreasonable discriminatory acts, either by civil or penal action. These acts of our own State would be wholly useless and nugatory if the position taken by the learned counsel for defendant were correct. No railroad company in Pennsylvania, however short its line or meager its equipment, could fail to show that some of the car equipment which it operates at some stage of its life had been used in interstate business. This simple fact alone, if the position of defendant's counsel is sustained, would defeat the right of a plaintiff to use the State Courts for a recovery against any railroad company within the State for an undue and unreasonable distribution of cars. Carried out to its logical conclusion, therefore, the argument of counsel proves too much.

Without laboring the merits of the question, however, further at this time, we are of opinion that the rule should be discharged as prematurely raising the question of jurisdiction.

Decree.

Now, July 19, 1911, Rule discharged at the cost of the defendant. Exception noted and bill sealed.

By the Court.

ALLISON O. SMITH, P. J.

Filed Jul- 20, 1911. Roll B. Thompson, Prothonotary.

No. 222.

STINEMAN COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Testimony.

GEORGE W. CLARK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. Altoona, Pennsylvania.

Q. How long have you lived there?

A. 18 years.

Q. In 1902, '3 and '4 what position did you hold with the Pennsylvania Railroad?

A. Car distributor at Altoona.

Q. What were your duties, just in a general way now?

A. Distribution of cars to the various regions.

Q. And to the various mines?

A. No sir.

Q. Various operations?

A. No sir, to the regions.

Q. Just to the regions?

A. Yes sir.

46 Q. Were you familiar with the rules that were enforced by the Railroad Company in distributing cars at that time?

A. I was familiar at that time, I don't know that I am familiar now.

Q. During the years 1902, '3 and '4 what was the rule with reference to charging the mine with individual cars in determining the number of cars that should go to that mine?

A. My recollection is they were not charged against the mine. I don't know that positively, the sheets would have to show that. It is so far back I can't say that positively.

Q. That is the way your understanding of the rule is, they were not chargeable against the mine?

A. At that period, yes sir.

Q. That is, if a mine was rated at 25 cars and it had 25 individual cars, it would still be entitled to its pro rata share out of the general Pennsylvania cars for distribution?

A. That is during the period that the individual cars did not count, provided the capacity of the mine siding would enable them to place their percentage of the railroad cars available that day.

Q. Now that was the general rule that was carried out, supposed to be carried out, was it, among the operators?

A. It was carried out so far as I know at that time, yes.

* * * * *

47

Stipulation.

It is admitted by the parties, that although substantially all of the plaintiff's coal on account of which recovery is sought, would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania.

48

Defense.

M. TRUMP called on part of defendant, being duly sworn and examined, testified as follows:

By Mr. GOWEN:

Q. What position did you hold with the Pennsylvania Railroad Company in the years 1902, '3 and '4?

A. General Superintendent of Transportation.

Q. You were familiar with the location of the Company's lines?

A. Yes sir.

Q. Were they confined at that time to the State of Pennsylvania or did they extend beyond the State?

A. Beyond the State.

Q. And was it engaged at that time in the transportation of freight and passengers both within the State and to points in different States?

A. It was.

Q. In other words, it was engaged in Interstate commerce?

A. Yes sir.

Q. Were you also familiar with the method of distributing cars by the defendant, during those years, to shippers?

A. Yes sir.

Q. Was there but one distribution made, leaving the question of the use of the car as between shipments to points within the State and shipments to points without the State at the option of the shipper?

A. Yes sir.

Q. The Company distributed its cars without any restriction then as to the use to which they should be put?

A. Yes sir.

Q. As between intra and interstate shipments?

A. We didn't know where they were going to when distributed.

Q. And you didn't prescribe what use the shipper should make of them?

A. No sir.

Q. Now as a matter of fact was it not a large volume of coal which was shipped by the various shippers to whom the cars were delivered shipped to points without the State?

A. Yes sir.

Q. In the three years which I have mentioned?

A. Yes sir.

49 Cross-examination.

By Mr. COLE:

Q. You did not require the shippers to designate when they ordered cars where the destination should be, did you, as a general thing?

A. No sir.

Q. Did the distribution of cars to the South Fork and the Mountain Divisions take place from Altoona, in the State of Pennsylvania?

A. Well Altoona and Harrisburg combined, yes sir.

50 Mr. GOWEN: If the Court please, we offer in evidence duly certified of seven decisions and orders of the Interstate Commerce Commission, which deal with and prescribe the method of distribution to be followed by carriers of coal cars where a percentage distribution is required. (Papers marked Defendant's Exhibits "A" to "G" inclusive.)

Mr. COLE: They are objected to as not being material to the facts in this case. I suppose they had better go into the record, but we raise this objection in order that we may not appear to admit their materiality.

The COURT: Objection overruled evidence admitted, exception noted for plaintiff and bill sealed.

51 (*Copy of Defendant's Exhibit "A."*)

"Interstate Commerce Commission,
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the supplemental report and orders of the Commission in the cases of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, No. 1063; W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company v. Pennsylvania Railroad Company, No. 1139; Clark Brothers Coal Mining Company v. Pennsylvania Railroad Company, No. 1111; James H. Minds and Julia A. Matz, trading as The Bulah Coal Company v. Pennsylvania Railroad Company, No. 1136, and James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company v. Pennsylvania Railroad Company, No. 1137, the original of which is now on file and of record in the office of said Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 4th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE,
Secretary.

Opinion No. 1833.

"Interstate Commerce Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY &
COMPANY,
v.
SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

52

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL
COMPANY,
v.
SAME.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES
H. Minds and William J. Matz, Lately Trading as The Bulah
Coal Company,

v.
SAME.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY &
COMPANY,
v.
SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

SAME.

53

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,

v.

SAME.

Submitted April 20, 1911. Decided March 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White and A. M. Liveright for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.
William A. Glasgow, Jr. and John H. Hall for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and James H. Gleason for Bulah Coal Company.

George V. Massey, Francis I. Gowen and Murray & O'Laughlin for defendant.

Supplemental Report of the Commission.

HARLAN, Commissioner:

In *Joynes v. P. R. R. Co.*, 18 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money

54 damages of that nature, arising out of discrimination ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in *Joynes v. P. R. R. Co.*, supra, had been announced, the circuit court of the United States for the eastern district of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.*, 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co.*, supra, there is a conflict of view as between the Commission and the very court to which these complaints, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these 55 claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C., 392; and *Bulah Coal Company v. P. R. R. Co.*, 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need to be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of \$27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for \$127,855.65, which upon reargument was restated at \$108,207.05, based on the assumption of a full car supply. A more conservative claim of \$65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share of these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular
56 and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(a) That the complainant's mines, known as Hillsdale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(b) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the state of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(c) That the average selling price for the coal at the mine for interstate markets would have been \$1.0711 per ton during the first period and \$1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively,
57 and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum

of \$17,500 in an action in the state courts similar to this proceeding, but relating only to intrastate traffic. *Hillsdale Coal & Coke Co. v. P. R. R. C.*, 229 Pa., 61; 78 Atl., 28.

Claim of Jacoby & Company.

We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392, the complainants were damaged to the extent of \$21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand \$51,950.49. The award above made we base upon evidence adduced of record from which we find:

(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138 $\frac{1}{4}$ days.

(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(d) That the average selling price of the complainants' product for the first period was \$1.212 per ton, and in the second period \$1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(e) The actual cost of production is shown by the record as \$1.106 per ton during the first period and \$1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of \$7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to \$31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim, as stated in the original petition was \$36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

59 (a) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(b) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale* case, *supra*, the complainant should have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(c) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the state of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(d) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion
60 of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(e) That the average selling price of the coal mined at Falcon No. 2 during the first period was \$1.289 per ton and during the second period \$1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and

96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was \$1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price of Falcon No. 4 was \$1.07 per ton during the first period and \$1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(f) That the actual cost of production is shown by the record as \$1.1419 per ton during the first period and \$1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was \$1.166 per ton during the first period and \$1.311 per ton during the second period; that the actual cost at Falcon No. 4 was \$1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at \$50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates \$155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new copartnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(a) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(b) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(c) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold, and shipped 120,415.68 tons during the first period and 214,-

257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold

a) interstate destinations.

62 (d) That the average profit on orders received by the complainants for points without the state of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregates \$15,016.60.

(e) That the cost of production at the complainants' mine during the first period was \$1.23 per ton on the average, and during the second period \$1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the state of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates \$35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the

responsibility that follows upon a careful study of the record
63 and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimate on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which

the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the state courts, to which reference has heretofore been made, the supreme court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * *

64 Counsel for appellant argued that because as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for *his* coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose.

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

Supplemental Orders.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 11th Day of March, A. D. 1913.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a

supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 356, and all the findings and conclusions
65 in said reports are hereby referred to and made a part hereof:

It is ordered, That the above named defendant be, and it is hereby, authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of \$27,193.01, with interest thereon at the rate of 6 per cent per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. Jacoby & Company,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above named defendant be, and it is hereby, authorized and directed to pay unto complainant-, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of \$21,094.39, with interest thereon at the rate of 6 per cent per annum from June 28, 1907,

as reparation for defendant's discrimination in distribution
66 of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above named Defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of \$31,127.96, with interest thereon at the rate of 6 per cent per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

67

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as The Bulah Coal Company

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof;

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of \$31,715.57, with interest thereon at the rate of 6 per cent per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and
68 full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof;

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto, complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of \$18,591.48, with interest thereon at the rate of 6 per cent per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*"

69

C. P., Clearfield County, May Term 1908.

No. 222.

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S EXHIBIT "C."

Orders.

At a General Sessions of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made

a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of
70 foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the first day of Nov. 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

71

(Copy of Defendant's Exhibit "D.")

"Interstate Commerce Commission
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the report and order of the Commission in the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, No. 1063, the original of which is now on file and of record in the office of said Commission.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 4th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Opinion No. 1383.

Before the Interstate Commerce Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

Decided March 7, 1910

Report and Order of the Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909. Decided March 7, 1910.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore, Held, that the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.

4. The defendant's contention that, so long as the petitioner

receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratable better at the hands of the carrier.

73 5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and Harry White for complainant.

Francis I. Gowen, George V. Massey, and Murray & O'Laughlin for Pennsylvania Railroad Company.

Report of the Commission.

HARLAN, *Commissioner*:

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may best be expressed, the petitioners bring to our attention the method or rules in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the Commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders

74 in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may

be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

75 The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in *Traer v. C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceedings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was presented by the Commission and the whole question was considered by that tribunal in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, and *Interstate Commerce Commission v. C. & A. R. R. Co.*, 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the

76 amended act to regulate commerce, and as such was a matter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distribution that must necessarily be observed by the courts between the power to regulate and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the Commission with respect to the distribution of coal cars by interstate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the Commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution.

* * * * *

77 We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the

78 former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in *Logan Coal Co. v. P. R. R. Co.*, 154 Fed. Rep., 497, 498, where the court says:

To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual cars will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times.

The result arrived at by the court in its illustration seems to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent, which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each a day and available equipment with a total capacity of 70 per cent or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which

this Commission has approved in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* and *Traer v. C. & A. R. R. Co.*, *supra*, would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating of the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine 80 would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in *Logan Coal Co. v. P. R. R. Co.*, *supra*, said, p. 503:

The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: *United States ex rel. Coffman v. N. & W. Ry. Co.* (C. C.), 109 Fed. Rep., 831; *United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al.* (C. C.), 125 Fed. 252; *W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co.*, 134 Fed., 198, 67 C. C. A. 220; *United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co.*, 143 Fed., 266, 74 C. C. A., 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St., 130, 23 N. E. 928; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed. 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other 81 mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all cars must be counted against the distributive share of the mine re-

ceiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (*supra*) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal.....	21
Foreign cars for supply coal.....	6
Individual cars.....	45
System cars for commercial coal.....	25
Foreign cars for commercial coal.....	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or

foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

* * * * *

83

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been
84 had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and

to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

85

(Copy of Defendant's Exhibit "E.")

"Interstate Commerce Commission,
Washington.

"I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the Report and Order of the Commission entered July 11, 1907, in cases No. 1008, Railroad Commission of Ohio and others against Hocking Valley Railway Company, and No. 1009 Railroad Commission of Ohio and others against Wheeling & Lake Erie Railroad Company, the original of which is now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 7th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Before the Interstate Commerce Commission.

No. 1008.

RAILROAD COMMISSION OF OHIO et al.

v.

HOCKING VALLEY RAILROAD COMPANY.

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No. 1009.

RAILROAD COMMISSION OF OHIO et al.

v.

WHEELING & LAKE ERIE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

W. H. Ellis, Attorney General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and Order of the Commission

No. 1008.

THE RAILROAD COMMISSION OF OHIO et al.

v.

THE HOCKING VALLEY RAILWAY COMPANY.

No. 1009.

THE RAILROAD COMMISSION OF OHIO et al.

v.

THE WHEELING & LAKE ERIE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called "private" cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such private and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which even- it should be given so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned

to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

W. H. Ellis, Attorney General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and Order of the Commission.

CLARK, Commissioner:

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The Attorney General of the State appeared for the complainants. Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the Commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly discriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company, it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway companies, and that while it has not adequate equipment of its own, it has loaned, leased, and furnished cars to the latter company.

89 In the complaint against the Wheeling & Lake Erie Railroad Company, it is stated that certain so-called "private" cars claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

Paragraph III of the Complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of the defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad companies so sending the cars have contracts for the furnishing of fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies,

not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that

because of that threat and because of the fact that competing roads were not at that time so counting such cars in distribution it ceased to count them; that on or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against the mines to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent on those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the Railroad Commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which owns nearly all of the stock of the Sunday Creek Company and the Wheeling & Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake Erie Coal Company. It can not be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

Since this case was argued the complications have been relieved by the Railroad Commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tippie of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial portion of the year it has a large number of idle cars; for the greater portion of the year it is able to provide all the cars needed, but for four or five months in the year it is unable to meet the maximum demand of shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business, the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated favoritism in the sending of the Hocking Valley Railway's cars to the K. &

92 M. road is alleged, on the ground that many mines of the Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The K. & M. is in substance and effect a part of the Hocking Valley system. In its annual report to this Commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley system through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(a) System cars, which includes cars owned by the defendant,

or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

(b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their
93 immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular coal companies, is involved. These are the cars included in class (c) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about \$150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price advanced by the coal companies, which second lien car-trust certificates were accepted by the coal companies in return for their cash payments, and, by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies, the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of
the mines of the coal companies. Assuming, therefore, that

94 the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company. It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described

and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal Mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business and some question as to the jurisdiction of this Commission is suggested. The testimony shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense. In the case of the Steamer Daniel Ball v. U. S., 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

95 In the case of the Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S., 426, the court held—

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the Commission and makes it its

duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

96 Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this Commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the Commission has no power to regulate the distribution of cars, and in this connection reference is made to the Commission's decision in the case of *Mason v. C., R. I. & P. R. Co.*, 12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the Commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the Commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the Commission, it has undoubted power and jurisdiction to deal with complaint that the practice of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the Commission and that of a court of equity.

In *Johnson Coal Mining Co. v. Hocking Valley Ry. Co.*, 14 Ohio Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling
97 freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the

distribution, to work his mines more economically, more nearly to their full capacity and more steadily. He can therefore afford to sell the fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion of available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United states ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., in which the coal company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant, did not count the private cars, or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in

99 times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever. The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"The regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employees of the railroad company and must lessen the facilities in that respect of the independent operators. Indeed an objection of the railroad company to individual ownership of cars is that they require special switching and special cars to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate commerce act. The mine operator would, in any state of the car supply, continue to
100 get the exclusive use of his individual cars as before, but when the supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region.

* * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore and Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela

River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore & Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate commerce act would permit these cars now the property of the railroad company to be taken out of its distributable car supply.

* * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of the exclusive use of their individual cars, but the individual cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they are not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Local [Logan] Coal Company v. Pennsylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the distribution. The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to discontinue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

"All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be per-

formed consistently with this paramount requirement of equal treatment to all. * * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown this enables the relator to ship somewhat more of its daily output than a competitor who only receives the use of company cars. * * * It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable

103 to do, and it seems to me that when an operator elects to avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the

mine as ascertained by the method adopted by the railway company. * * *

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of

104 Pennsylvania as to the propriety of counting the foreign railway fuel cars in the distribution of equipment are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of the act to regulate commerce and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the Commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private cars" for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

It is to be noted that the recommendation of the Commission refers to "private" or "individual" cars in fact; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they

105 were not intended, as seems to have been contemplated by the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars and the system cars should be taken into con-

sideration in determining the distribution. If the number of foreign railway fuel cars or of private cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions which require carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and it may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assignment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all be on an equality, and the effect cannot be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This Commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In *Rice, Robinson & Witherop v. W. N. Y. & P. R. Co.*, 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. This is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

It is admitted that the cars so held under lease are devoted to the

exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of \$150,000. in cash, for which, in a comparatively short period, they received an equivalent amount of interest bearing car trust certificates.

107 Assuming that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

Order.

Upon the foregoing report—

It is ordered, That the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

108 It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the

percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars."

109 DEFENDANT'S EXHIBIT "F."

* * * * *

Order.

At a General Sessions of the Interstate Commerce Commission Held
At Its Office in Washington, D. C., on the 13th Day of April,
A. D. 1908.

Present: Martin A. Knapp, Judson S. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1294.

GLENN W. TRAER, Receiver of the Illinois Collieries Company,
v.

CHICAGO & ALTON RAILROAD COMPANY.

No. 1295.

SAME

v.

CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY OF ILLINOIS.

No. 1317.

SAME

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

These cases being at issue upon complaints and answers on file,
and having been duly heard and submitted by the parties,
110 and full investigation of the matters and things involved
having been had, and the Commission having, on the date
thereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carriers' own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carriers' own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carriers' own fuel cars assigned to it, is greater than

111 its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carriers' own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carriers' own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carriers' own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carriers' own fuel cars, and so-called private cars."

* * * * *

112

Order

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 2nd Day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1322.

RAIL & RIVER COAL COMPANY

v.

BALTIMORE & OHIO RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereof:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private

113 coal cars against the distributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars,

enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant."

114 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Agreement of Counsel.

It is agreed between Counsel that this case shall be disposed of in the following manner:

First. That a verdict shall be taken in the sum of Twelve Thousand Five Hundred Dollars in favor of the plaintiff, and that said verdict shall be subject to the following questions of law, which are hereby reserved:

1st. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

2nd. As to whether or not the rules prescribed by the Interstate Commerce Commission, and their various orders which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that, if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant N. O. V.

3rd. As to the question of the jurisdiction of the court to entertain the action at all.

Testimony closed.

115 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Charge of the Court.

Gentlemen of the Jury, in the case in which you were sworn, namely, the Stineman Coal Mining Company vs. The Pennsylvania

Railroad Company, the Counsel have shortened the labors of the jury and perhaps lengthened the labors of the Court, by an adjustment or agreement as to the amount of the verdict which should be rendered by you; that amount being \$12,500.00, subject to the reservation of the question of law involved in a certain stipulation which has been filed and agreed to by Counsel, and also subject to the reservation on the points submitted by Counsel for defendant, which I will not read to you, which, if sustained by the Court, would perhaps render a verdict for the defendant. We reserve all of the points presented by Counsel for the defendant and will consider them as questions of law hereafter. So far as the jury is concerned, your labors are ended and you should simply render a verdict for \$12,500. in favor of the plaintiff, and the Prothonotary will take that verdict. The defendant's points are refused, subject to the question of law reserved.

116 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Defendant's Points.

Assignment of Error No. 2.

("1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.")

Assignment of Error No. 3.

("2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant.")

"3. The plaintiff is not entitled to recover in the present action any loss which it may have sustained because of the non-receipt of cars from the defendant which, when loaded, would have been consigned by it to points without the State of Pennsylvania, even though the coal which would have been loaded therein would have been

sold by the plaintiff to purchasers to whom title to the same passed at the mine."

Assignment of Error No. 4.

("4. Under the law and the evidence the plaintiff is not entitled to recover.")

117 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Verdict of the Jury and Judgment Thereon.

And now to wit: Nov. 12, 1912, we, the Jurors empaneled in the above entitled case, find Verdict for Plaintiffs \$12,500.

— — —, Foreman.

Judgment was subsequently entered for the full amount of said verdict.

118 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Motion for Judgment Non Obstante Veredicto.

Now, November 14, 1912, defendant company moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record.

MURRAY & O'LAUGHLIN,

Attorneys for Defendant Company.

Now, November 14, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
Of Counsel for Plaintiff.

Filed November 14, 1912. John H. Moore, Prothonotary.

119 Court of Common Pleas of Clearfield County, May Term,
1908.

No. 222.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Motion in Arrest of Judgment and for New Trial.

Now, November 14, 1912, defendant company moves in arrest of judgment and for a new trial for the following reasons:

First. The Court erred in the admission and rejection of evidence.

Second. The Court erred in the general charge to the jury and in answer to points of plaintiff and defendant.

Third. The verdict of the jury is against the weight of evidence.

Fourth. The verdict of the jury is contrary to the law applicable to this case.

Fifth. And for other errors and irregularities in the case.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant Company.

Now, November 14, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
Of Counsel for Plaintiff.

Filed November 14, 1912. John H. Moore, Prothonotary.

Sur Motion and Rule in Arrest of Judgment and for New Trial.

Sur Motion and Rule for Judgment non obstante veredicto.

120 Court of Common Pleas of Clearfield County, May Term,
1908.

No. 222.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Opinion and Decree.

The plaintiff in this case brought suit against the defendant company to recover for alleged discrimination in the furnishing of cars for the coal trade of the plaintiff company. The plaintiff company is an operator located in Cambria County, on the main line of the Pennsylvania Railroad, and was one of the operators doing

business in what was known as the Mountain Division for purposes of car distribution. The complaint was that it was unfairly treated and discriminated against by the defendant company in its distribution of cars for coal trade service and that the defendant unreasonably and unjustly gave a preference in the distribution of cars to the Berwind-White Coal Mining Company, a corporation doing business on a sub-division called the Scalp Level Division.

After proceeding with the trial for a day or so an adjustment as to the amount of verdict, together with the questions of law reserved, was reached by counsel, as appears in the following stipulation, namely:

"It is agreed between Counsel that this case shall be disposed of in the following manner:

"First. That a verdict shall be taken in the sum of \$12,500 in favor of the plaintiff, and that said verdict shall be subject to the following questions of law which are hereby reserved.

121 "1. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

"2. As to whether or not the rules prescribed by the Interstate Commerce Commission and their various orders, which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant N. O. V.

"3. As to the question of the jurisdiction of the Court to entertain the action at all."

In accordance with this stipulation a verdict of the jury was taken in the sum of \$12,500. Whereupon the defendant moved for a new trial and for judgment non obstante veredicto, which are now to be disposed of.

The principal question contended for on behalf of the defendant is that this Court does not have jurisdiction of the cause of action. It is conceded by the learned counsel for defendant that this Court is bound by the decision of the Supreme Court of the State of Pennsylvania in the case of the Puritan Coal Mining Company against the Pennsylvania Railroad Company, recently decided and which will be reported, as shown by the Advance Reports, in 237 Pa. St. 420. The case, as we understand it, is conceded to be similar in its facts to that case. The plaintiffs in both cases were located in the Mountain Division. They were subject to the same region distribution, and it is alleged were discriminated against alike in car service by reason of the preference given in special orders in favor of the Berwind-White Coal Mining Company, of the Scalp Level Division. In this case, however, the defendant
122 offered a series of proceedings before the Interstate Commerce

Commission in a number of cases brought by parties before said Commission, for the adjustment of certain alleged matters of car distribution, against a number of railroads therein named and which appear in the testimony under the heading of Defendant's Exhibits "A," "B," "C," "D," "E," "F," and "G." This testimony of the action of the Interstate Commerce Commission respecting the matters involved was not in evidence in the Puritan case, and because of that it is now claimed by the learned Counsel for defendant that this case differs from said Puritan Coal Mining Company case on the question of jurisdiction. The present plaintiff was not a party in any of those proceedings. They all relate to the system of method of distribution prevailing on the different railroads named in the said complaints to the Interstate Commerce Commission and resulted in orders or decrees being made regulating the kind and character of cars to be distributed to the coal service and the proper method of making distribution to shippers along the lines of said railroads. Not to go into detail with respect to these several orders of the Interstate Commerce Commission, it is sufficient for the purposes of this case, we believe, to say that none of the said orders of the Interstate Commerce Commission are shown to antedate the period of the action in this case, the earliest being that against the Hocking Valley Railway Company (Exhibit "E"), decided July 11, 1907. It is contended on behalf of the defendant company that the existence of these orders, especially that of Exhibit "A" with reference to the Pennsylvania Railroad, decided in 1910, indicates that the Interstate Commerce Commission have occupied the field and thereby ousted the jurisdiction of all State Courts with reference to the subject matter therein passed upon. It is, hence, claimed that the proofs in this case differentiate it from the decision in the Puritan Coal Mining

123 Company case, *supra*. With this contention we cannot agree. The decision of the Supreme Court in the Puritan Coal Mining Company case must be considered as having been decided with full knowledge of the fact that the Interstate Commerce Commission had, in special cases brought to their attention, promulgated certain rules and orders controlling future car distribution, that is, distribution made subsequent to the date of the orders of the Interstate Commerce (Commission). The proof of that is that one of the cases cited by Mr. Justice Stewart, in his opinion, is that of Illinois Central Railroad Company vs. Interstate Commerce Commission, 215 U. S. 481, which case especially involved an Interstate Commerce Commission order of distribution. We are fully of the opinion that this case, therefore, is not only exactly similar in its facts to the Puritan Coal Mining Company case but that it is governed in all respects on the law by that opinion.

Mr. Justice Stewart, after quoting from decisions of the Supreme Court of the United States, thus summarizes: "We derive from this opinion these inevitable conclusions: (1) that where Congress prescribed a particular act, not in itself an offence at common law, jurisdiction with relation thereto attaches to the Federal Courts; (2) where the act is an offence at common law, and made so as well by

State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts; (3) that the Interstate Commerce Act does not attempt any more than does the common law to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; (4) that when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress has especially legislated with respect thereto, and such

124 circumstance draws exclusive jurisdiction of the offence to the Federal Tribunal; (5) that except as to the thing the

Commission had defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own statute, or the common law as the case may be." The learned Justice then proceeds to show how the Commission has exercised its jurisdiction, especially citing the case of *Illinois Central Railroad Company vs. Interstate Commerce Commission*, supra, as an illustration of an adjudication which formulated general rules for the observance of all railroads; and holding in the opinion that the regulation therein announced "is as much the law of the land as though written in the lines of the Interstate Commerce Act and that having been legislated upon by the Commission exclusive jurisdiction with respect thereto vests in the Federal tribunal." In distinguishing the *Puritan* case the learned Justice then says: "Here it is not complained that defendant had disregarded any order of the Commission; nor has any order of the Commission even remotely regulating the subject of the complaint here been shown. What is complained of is that the defendant having voluntarily adopted a system for the distribution of its cars which it must have regarded as just and equitable, and from which it makes no claim to be released, openly and flagrantly disregarded it by daily distributing to the *Berwind-White Coal Company* a much larger number of cars than its rating called for, while furnishing complainant with less than it was entitled to under its rating. The grouping of plaintiff's mines in a class with others for purposes of service; the determination of the total number of cars to be devoted to such service; the ratings of the several mines within the group and the pro rata of distribution, were not matters regulated by the order of the Commission, but matters decided upon by the defendant company with a view to avoid prejudice to the shipper. Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been

125 sustained and followed by an order of amendment or correction of the regulation, then, upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court, since in that case again Congress would have taken possession of the field. But there is nothing of that kind here; nothing but a case of discrimination pure and simple; not a specific offence created by the express terms of the Federal statute, not an offence against any order of the Commerce Commission, but an offence which could fall within the Federal

statute and the common law as well, and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared. Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the state, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our State Statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. vs. Larabee Mills, supra (211 U. S. 612). The two cases on principle cannot be distinguished and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offence was committed within the State."

The above quotation from the Puritan case is equally applicable to the facts in this case. The offence alleged here is that of "discrimination pure and simple." No specific offence created 126 by the express terms of the Federal statute is alleged to have been violated. Neither is any offense against any order of the Commerce Commission set up as the basis of recovery. The period sued for, between April 1st, 1902, and January 1st, 1905, antedates all general rules, regulations or orders of the Interstate Commerce Commission which could by any construction be said to be applicable to the case in hand. We are of opinion therefore that there is nothing offered in defense in this case which would justify a ruling that the State court did not have jurisdiction.

It is contended, however, aside from the general question of jurisdiction, that under the reserved questions involved in the stipulation or agreement of Counsel judgment should be entered in favor of the defendant non obstante veredicto, for the reason that said stipulation practically admits that had plaintiff been charged with individual cars it received all to which it was entitled. The language of the last clause of the second reserved question is as follows: "It being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment should be entered in favor of the defendant N. O. V." It is not exactly clear what is meant by this stipulation. "The practice" referred to we assume to be the practice of the Railroad Company, that is, its method of distribution in not counting individual cars against the party receiving them. "The law" we assume to be the law which should govern this case. And "the rules" referred to we assume to be the rules or orders of the Interstate Commerce Commission put in evi-

dence in this case. As stated, the case was not tried to a finish. There is no evidence in the case which would show that individual cars were operated in favor of the plaintiff company to the extent that it would fill its full pro rata share of cars under any system of distribution. The agreement on the verdict, as per the stipulation,

- we assume does establish, however, first, that there was discrimination practiced against the plaintiff and in favor of Berwind-White Coal Mining Company as declared on; second, that plaintiff was entitled to \$12,500 as a measure of its damages for such discrimination; third, that it did receive for its use individual cars to the extent which the pro rata of cars to the Mountain Division entitled it had such individual cars been charged against its rating in accordance with the present order or rules of the Interstate Commerce Commission. This also has been disposed of, as we believe, by the opinion in the Puritan Coal Mining Company case, supra, in the following language: "The complaint that the court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces matter foreign to the issue in the case. The issue had regard to the cars owned by the defendant company. The period of discrimination complained of antedated the decision in the cases of Interstate Commerce Commission v. Illinois Central R. R. supra, where it held to be the duty of the interstate carrier in making distribution of its cars in times of shortage to include in the computation private cars in addition to its own. In making its distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the cases referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that
- 128 the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the bases of distribution upon which all acted throughout the entire transaction." This view of the law is reasonable and equitable from every standpoint. The Railroad Company saw fit during the period of the action of this case to adopt and carry into effect a rule of distribution excluding private cars from computation in charging against the individual shipper. It then proceeded to distribute its unassigned or system cars to the several shippers along its line according to their rated capacity. This undoubtedly gave a great preference and advantage to the shipper owning individual cars.

Having adopted it, however, can it now either in mitigation or as a complete offset to a claim of damages get immunity because of such apparent inequitable practice. To do so would put a premium on its own wrong doing. It may well be assumed that the preferred shipper likewise used individual and assigned cars. The complaint sued for is distinctly against the practice of discrimination as to unassigned or system cars, as to which the verdict establishes the fact of such discrimination. Under the then prevailing practice of the defendant company the plaintiff may have been forced to buy, lease or otherwise arrange for individual cars as a matter of self protection against the very discrimination alleged. If it could not get system cars, it may have been obliged to resort to individual cars to maintain its standing as a coal operator. To buy or lease cars meant an outlay of considerable money. To get individual cars from other operators, as is often done, and seems to be indicated by some of the testimony offered in this case, usually involves a sacrifice to some extent of the price to be received. As we look at it, therefore, the question of the individual cars used by the plaintiff does not enter into the issue involved in this case and certainly should not be used to deprive plaintiff of the damages agreed on as measuring
129 the injury sustained by plaintiff because of its being deprived of its pro rata share of system cars.

All other questions raised in the reasons urged in the motion for new trial are conceded to have been disposed of in the Puritan case.

Decree.

Now, January, 27th, 1913, the motion and rules for new trial and for judgment non obstante veredicto in favor of the defendant are hereby overruled and discharged, and judgment is directed to be entered on the verdict in favor of the plaintiff on payment of the jury fee as required by law. To this action of the Court, at request of Counsel for defendant, exception is noted and bill sealed.

By the Court.

(Signed)

ALLISON O. SMITH, P. J.

Filed 27 Jan. 1913. John H. Moore, Prothonotary.

130 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Appeal from the Judgment of the Court of Common Pleas of
Clearfield County.

Assignments of Error.

1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same. (Appendix, page 237a.)

2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:

"1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals."

(Page 8.)

3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:

"2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant."

(Page 8.)

4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

131 "4. Under the law and the evidence the plaintiff is not entitled to recover."

(Page 8.)

5. The Court below erred in overruling the defendant's motion for judgment non obstante verdicto.

(Appendix, page 249a.)

6. The Court below erred in entering judgment on the verdict in favor of the plaintiff.

(Appendix, page 249a.)

132 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Appeal by Defendant from the Judgment of the Court of Common
Pleas of Clearfield County.

Filed June 27, 1913.

MESTREZAT, J.:

This is an action of trespass to recover damages for loss sustained by the plaintiff company by reason of unlawful discrimination against it by the defendant in furnishing coal cars. The period of action was from April 1, 1902, to January 1, 1905. At the conclusion of the testimony of the trial of the cause, the case was disposed of by the following stipulation of counsel filed of record:

"First. That a verdict shall be taken in the sum of \$12,500 in favor of the plaintiff, and that said verdict shall be subject to the following questions of law which are hereby reserved: "1. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action. "2. As to whether or not the rules prescribed by the Interstate Commerce Commission and their various orders, which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced: it being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant N. O. V. "3. As to the question of the jurisdiction of the Court to entertain the action at all."

In accordance with the stipulation, the court directed a verdict for the plaintiff for the amount agreed upon, refusing the defendant's points subject to the questions of law reserved. Subsequently the court overruled the motions for a new trial and for judgment n. o. v. and directed judgment to be entered on the verdict. The defendant has appealed.

The assignments of error are to the refusal of defendant's motion to dismiss the action for want of jurisdiction; the refusal of binding instructions on the same ground and on the further ground that if the distribution of cars by the defendant had been in accordance with the system which the Interstate Commerce Commission has prescribed in the decisions given in evidence the plaintiff company

would not have received any more cars than it did receive; the overruling of the motion for judgment n. o. v.; and the entry of judgment on the verdict.

It will be observed that there are two questions in the case. The first and principal question is as to the jurisdiction of the court to hear and determine the cause, and that has been settled against the defendant's contention by our decisions in *Puritan Coal Mining Company vs. Pennsylvania Railroad Company*, 237 Pa. 420, *Sonman Shaft Coal Company vs. Pennsylvania Railroad Company* and *Clark Brothers Coal Mining Company vs. Pennsylvania Railroad Company*, opinions in the last two cases being handed down herewith. In this case, as in the *Clark* case, the defendant put in evidence a series of proceedings before the Interstate Commerce Commission in certain cases brought by shippers before the Commission for adjustment of car distribution against various railroad companies. The proceedings resulted in orders by the Commission regulating the kind and character of the cars to be distributed to the coal service and the proper method of making distribution to shippers along the lines of the respective railroads. The plaintiff here was not a party to any of these proceedings. We deem it sufficient to say that the orders of the Interstate Commerce Commission are

134 not involved in this case. The suit is not brought on them, nor does the plaintiff company claim that it has been injured because the defendant violated them. What the plaintiff company does claim and what it seeks to recover here is damages for the wrongs committed against it by the defendant in violation of the latter's common law and statutory duty as a common carrier. In such cases we shall not deny access to our courts by the injured citizen seeking relief by reason of the enactment of a Federal statute dealing with interstate commerce until the jurisdiction is denied by a court having the power to finally adjudicate the question.

The other defense set up by the defendant to defeat recovery is a little singular to say the least. By the stipulation filed of record by the parties it appears that by the method of distribution of cars among shippers adopted and practiced by the defendant during the period of this action individual cars were not charged against the distribution share of the mine. In violation of this system, discrimination in the distribution was practiced against the plaintiff and in favor of the *Berwin-White Coal Mining Company* as averred in the statement, resulting in damages to the plaintiff of the stipulated sum of twelve thousand five hundred dollars. The defendant now claims that it is not liable for this discrimination because its own rules of distribution were in violation of the present order or rules of the Interstate Commerce Commission by which the plaintiff's rating would have been charged with its individual cars, and the plaintiff company would then have received all the cars it was entitled to. In other words, the defendant concedes that it ignored its own rules and disregarded its own basis of distribution in furnishing cars to the plaintiff and discriminated against the latter and in favor of a competing shipper, but seeks to justify its unlawful conduct and injury to the plaintiff on the ground that in

making the distribution it had violated a subsequently promulgated order of the Interstate Commerce Commission. We have expressed our views on the merits of such a defense in the Puritan case in which the present defendant being also the defendant in that case successfully attempted under like circumstances to avoid liability for similar discriminatory acts on the same ground. The pertinent language of our opinion in that case is a sufficient answer to the defendant's contention (p. 458): "In making distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequence of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction."

The judgment is affirmed.

136 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

STINEMAN COAL MINING COMPANY, Defendant in Error.

COMMONWEALTH OF PENNSYLVANIA,

County of Clearfield, ss:

On this 23rd day of September in the year of Our Lord one thousand nine hundred and thirteen, before me the undersigned, a Notary Public in and for the said County and State, resident at Clearfield, Pennsylvania, personally appeared Jas. P. O'Laughlin who being duly sworn according to law doth depose and say that he served a copy of the Specifications of Error of the Plaintiff in Error in the proceeding in error to the Supreme Court of Pennsylvania upon Alfred M. Liveright of the attorneys of record for the said Stineman Coal Mining Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Specifications of Error, on the 23rd day of September A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September
A. D. 1913.

[Seal Walter Welch, Notary Public, Clearfield, Penna.]

WALTER WELCH,
Notary Public.

Commission Expires Feb. 21, 1915.

137 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

*Præcipe Indicating the Portions of the Record to be Incorporated
into the Transcript of the Record on Writ of Error.*

To the Honorable James T. Mitchell, Prothonotary of the Supreme
Court of Pennsylvania:

Pursuant to Section 1 of Rule 8 of the Rules of Practice of the
Supreme Court of the United States, you are respectfully requested
to incorporate into the Transcript of the Record to be certified to
the Supreme Court of the United States, and there filed in connection
with the Writ of Error heretofore sued out from the Supreme Court
of Pennsylvania to the said Supreme Court of the United States in
the above entitled case, the following portions of the Record:

138 1. Original statement of plaintiff's claim (printed on page
208a et seq. of the Appendix to Appellant's Paper Book filed
in this case in the Supreme Court of Pennsylvania, a copy of which
is hereto attached and marked Exhibit "A").

2. Opinion of Trial Judge sur plaintiff's motion for leave to file
amended statement (printed on page 215a et seq. of Exhibit "A"
hereto attached).

3. Plaintiff's amended statement (printed on page 220a et seq.
of Exhibit "A" hereto attached).

4. Defendant's plea (printed on page 227a et seq. of Exhibit "A"
hereto attached).

5. Motion to dismiss action for want of jurisdiction (printed on
page 227a et seq. of Exhibit "A" hereto attached).

6. Plaintiff's answer to rule to dismiss action (printed on page
230a et seq. of Exhibit "A" hereto attached).

7. Opinion of Trial Judge sur motion and rule to dismiss action
(printed on page 232a et seq. of Exhibit "A" hereto attached).

8. The following excerpts from the testimony:

The testimony of George W. Clark (printed on pages 52a and
53a of Exhibit "A" hereto attached, beginning with the question
on page 52a "Q. Where do you live?" and ending with the answer

on page 53a "A. It was carried out so far as I know at that time, yes."

Stipulation on page 54a reading as follows:

"It is admitted by the parties, that although substantially all of the plaintiff's coal, on account of which recovery is sought, would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania."

The testimony of M. Trump on pages 54a, 55a, and 56a, beginning with the question "Q. What position did you hold with The Pennsylvania Railroad Company in the years 1902, 3 and 4?" and ending with the answer on page 56a "A. Well Altoona and Harrisburg combined, yes sir."

Offer of opinions and orders of the Interstate Commerce Commission (printed on page 56a of Exhibit "A" hereto attached) as follows:

"Mr. GOWEN: If the Court please, we offer in evidence duly certified copies of seven decisions and orders of the Interstate Commerce Commission, which deal with and prescribe the method of distribution to be followed by carriers of coal cars where a percentage distribution is required. (Papers marked Defendant's Exhibits "A" to "G" inclusive).

Mr. COLE: They are objected to as not being material to the facts in this case. I suppose they had better go into the record, but we raise this objection in order that we may not appear to admit their materiality.

The COURT: Objection overruled, evidence admitted, exception noted for plaintiff and bill sealed."

139 Defendant's Exhibit "A" in full (printed on page 57a et seq. of Exhibit "A" hereto attached).

Excerpt from defendant's Exhibit "C," beginning on page 81a with the words "Orders. At a General Sessions of the Interstate Commerce Commission," etc., and ending on page 92a with the paragraph "And it is further ordered, That the question of damages claimed by the complainants in these proceedings in respect to the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

Excerpt from defendant's Exhibit "C," beginning on page 91a of Exhibit "A" hereto attached with the words "Copy of Defendant's Exhibit 'D,'" and extending to the words on page 98a of Exhibit "A" hereto attached "It may be well, however," etc., found on the third to the last line on the said page: and beginning again on page 102a of Exhibit "A" hereto attached with the paragraph "We come now to the practice of the defendant," etc., and extending to the paragraph on page 107a of Exhibit "A" hereto attached, beginning "In view of our finding herein that the practice," etc. Also a third excerpt from Exhibit "A" beginning on page 144a of Exhibit "A" hereto attached with the words "Order. At a General Session of the Interstate Commerce Commission," etc., and ending with and including the last paragraph on page 145a.

Exhibit "E" entire (printed on page 146a *et seq.* of Exhibit "A" hereto attached).

Excerpt from Defendant's Exhibit "F," beginning on page 183a of Exhibit "A" hereto attached with the words "Order. At a General Session of the Interstate Commerce Commission," etc., down to and including the remaining portion of Exhibit "F" as far as to Exhibit "G."

Excerpt from Defendant's Exhibit "G," beginning on page 203a of Exhibit "A" hereto attached with the words "Order. At a General Session of the Interstate Commerce Commission," etc., down to and including the remaining portion of Exhibit "G" as far as to the words on page 204a "It is agreed between Counsel," etc.

9. Agreement of Counsel (printed on pages 204a and 205a of Exhibit "A" hereto attached).

10. Charge of the Trial Court (printed on page 7 of the Appellant's Paper Book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "B.")

11. Defendant's points (printed on page 8 of Exhibit "B" hereto attached).

12. Verdict of the Jury and judgment thereon (printed on page 9 of Exhibit "B" hereto attached).

13. Defendant's motion for judgment non obstante verdicto (printed on page 238a of Exhibit "A" hereto attached).

14. Defendant's motion in arrest of judgment and for new trial (printed on pages 238a and 239a of Exhibit "A" hereto attached).

15. Opinion of Trial Court discharging said motion (printed on page 239a *et seq.* of Exhibit "A" hereto attached).

140 16. Decree of Trial Court sur said motion (printed on page 249a of Exhibit "A" hereto attached).

17. Assignments of Error in the Supreme Court of Pennsylvania (printed on pages 9 and 10 of Exhibit "B" hereto attached).

18. Opinion of Supreme Court of Pennsylvania affirming the judgment of the Court below.

19. Petition filed by the plaintiff in error with the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, praying for the allowance of a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States.

20. Action of the Honorable D. Newlin Fell, Chief Justice, allowing the writ of error.

21. Writ of error on appeal to the United States Supreme Court.

22. Specifications of error filed by the plaintiff in error.

FRANCIS I. GOWEN,

Attorney for the Plaintiff in Error.

141 COMMONWEALTH OF PENNSYLVANIA,

County of Clearfield, ss:

On this 23rd day of September, in the year of our Lord, one thousand nine hundred and thirteen, before me, the undersigned Prothonotary of the Court of Common Pleas of said County personally appeared Jas. P. O'Laughlin, who being duly sworn according to law doth depose and say that he served a copy of

foregoing Præcipe upon Alfred M. Liveright, of the attorneys of record for the said Stineman Coal Mining Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Præcipe and of the exhibits thereto attached, on the 23rd day of September, A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September, 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE, *Proth'y*

142 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true and correct copy of the Record, so full and entire as is indicated by the attached præcipe.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of October, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

143 I, D. Newlin Fell Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Alfred B. Allen, was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 11th day of October one thousand nine hundred and —.

D. NEWLIN FELL.

I, Alfred B. Allen Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 11th day of October one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

1 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania:

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad Company, on September 23, 1913 served a copy of the præcipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter præcipe of the defendant in error; that by inadvertence, counsel for the defendant in error failed within 10 days of service upon them of the præcipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter præcipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter præcipe may be enlarged by a Judge of the Court whose decision is made the subject of review, or by a justice of
2 the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their præcipe until the 6th day of December, 1913.

And they will ever pray.

A. L. COLE.

A. M. LIVERIGHT.

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

A. M. Liveright, one of the petitioners, being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

A. M. LIVERIGHT.

Subscribed and sworn to before me this 15 day of November, 1913.

[SEAL.]

JAMES K. HORTON,
Notary Public.

My commission expires March 14, 1915.

3

Order of Court.

And now 17th day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the præcipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as a part of the transcript of the record and be therein incorporated.

JNO. P. ELKIN,
Justice of Supreme Court.

4 Endorsement: In the Supreme Court of Pennsylvania, Eastern District. No. 53. January Term, 1913. Stineman Coal Mining Company vs. Pennsylvania Railroad Company. Petition in re record on writ of error to United States Supreme Court. Presented in Chambers Nov. 17, 1913, and within order made. Jno. P. Elkin, Justice of Supreme Court. Filed Nov. 26, 1913, in Supreme Court. A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Pa.

5 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe of Defendant in Error, Indicating Additional Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

In addition to the portions of the record called for by the plaintiff in error, you are respectfully requested to incorporate into the tran-

script of the record to be certified to the Supreme Court of the United States, and there file in connection with the writ of error heretofore sued out in the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the record.

A. L. COLE,
A. M. LIVERIGHT,
Att'ys for Defendant in Error.

(1) Testimony of W. I. Stineman, pages 2a to 25a inclusive in Exhibit "A" attached to præcipe of plaintiff in error.

(2) Testimony of John Scott, Jr., pages 25a to 29a inclusive, in the said Exhibit.

(3) Testimony of George E. Scott, page 33a to cross-examination at page 41a of the same Exhibit, inclusive.

(4) Letters, beginning at the foot of page 29a with the words "December 1, 1902, M. Trump, Esq." and continuing through pages 29a, 30a, 31a, 32a, and 33a of the same Exhibit to the testimony of George E. Scott.

(5) Excerpt from the testimony of George W. Clark, beginning with "Did you know during that period of special orders being issued for the Berwind-White Coal Mining Company?" at page 53a, to the words "When it was possible they were carried out" at top of page 54a of the same Exhibit.

6 (6) Statement by Mr. Cole on page 54a of the same Exhibit, reading "I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want."

(7) Excerpt from the defendant's Exhibit "D" in said Exhibit "A" beginning with the paragraph opening "The complainant alleges that the system" at the fifth line at the foot of page 121a, and concluding with the words "Must have accrued" at the middle of page 122a.

Endorsement: No. 53 January Term, 1913—In the Supreme Court of Pennsylvania, Eastern District—Stineman Coal Mining Company vs. Pennsylvania Railroad Company, Appellant—Præcipe of defendant in error—Filed Nov. 26, 1913 in Supreme Court—A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

7 W. I. STINEMAN, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. South Fork, Cambria County.

Q. How long have you lived there?

A. Some forty odd years.

Q. All your life practically?

A. Yes, sir; born and raised there.

Q. What is your business?

A. I am manager of the Stineman interests at South Fork.

Q. How long have you held that position?

A. Twenty-three years.

Q. What do you mean by Stineman interests?

A. I mean the Stineman Coal Mining Company and the Stineman Coal & Coke Company Mines.

Q. This action is brought by the Stineman Coal Mining Company. Were you in 1902, 1903 and 1904 connected with that?

A. Yes, sir.

Q. In what capacity?

A. As manager.

Q. Did you manage their coal operations?

A. Yes, sir.

Q. At that time were you also connected with the Stineman Coal & Coke Company?

A. Yes sir.

Q. In what capacity?

A. As manager.

Q. You say you held this position for twenty-three years?

A. About twenty-three years; yes, sir.

Q. Has it always been the same character of position?

A. Practically so.

8 Q. What is the business of the Stineman Coal Mining Company?

A. To mine and ship coal to the market, as I understand it.

Q. And of the Stineman Coal & Coke Company?

A. The same.

Q. Where are the mines of the Coal Company situated?

A. They are all located at South Fork.

Q. In interrogating you I shall designate the Stineman Coal Mining Company as the Coal Company, and the Stineman Coal & Coke Company as the Coke Company, for brevity. Where are the mines of the Coal Company with reference to the main line of the Pennsylvania Railroad?

A. The side track leading to all those mines come off the yard of the South Fork Railroad and I would judge about 2,500 to 3,000 feet from the yard the mines are located.

Q. The South Fork Railroad is a branch of what?

A. The Pennsylvania.

Q. Where does it connect with the Pennsylvania?

A. At South Fork.

By the COURT:

Q. Then your sidings come off the South Fork branch?

A. They come off the yard of the South Fork branch, what is commonly known as the north end of the South Fork yards.

Q. Your siding is not on the main line?

A. They are not off the main line. I believe their tonnage is credited to the Mountain Division, not to the South Fork Railroad.

9 By Mr. LIVERIGHT:

Q. You say you are a part of the Mountain Division of the Pennsylvania Railroad?

A. That is what I understand.

Q. From whom?

A. From the car distributor.

Q. Of the Pennsylvania Railroad?

A. Yes sir.

The COURT: Those are not operating divisions, are they, of the railroad?

Mr. COLE: They are just subdivisions for distribution purposes.

The COURT: That is what I understand, they are simply subdivisions for car distributing purposes but not operating divisions of the Pennsylvania Railroad.

Mr. LIVERIGHT: Subdivisions for car purposes of the defendant Company.

A. These tracks were originally connected with the main line of the Pennsylvania Railroad. When the South Fork Railroad was put in *their* [there] for their convenience the tracks were changed and connected to the yard of the South Fork Railroad.

Q. Where are the mines of the Berwind-White Coal Mining Company?

A. They are located on the Scalp Level branch of the South Fork Railroad.

Q. Where do they lie with reference to your mines?

A. Lay south of the Stineman interests.

Q. How far?

A. Probably about 10 to 12 miles.

Q. Of what division are they a part?

A. They are part of the Scalp Level Railroad or South Fork.

10 Q. Is that a different car distribution division than yours?

A. I can't say. I don't know about that.

Q. You do know they are part of the Scalp Level?

A. I do know they are located on the South Fork Railroad.

Q. What rate to market do these two sets of mines take?

A. What is that?

Q. What rate to market does the coal of these two sets of mines take, the Berwind-White and Stineman?

A. They take the same freight rate, I understand.

Q. How do they compare with each other in general characteristics as to coal accessibility and other features?

A. The mines are working the same seam, which is commonly known as the Miller or B vein of coal, the Scalp Level mines and the South Fork mines.

Q. Will you take the pointer, Mr. Stineman, and point out for the benefit of the jury on this schedule in front of you the location of the various properties?

A. This extension here runs up into what is known as the Wind-

ber or Scalp Level field. This line coming in here comes off the main line of the Pennsylvania Railroad. These are the Stineman tracks going up in here to the common yards. This is the tippie of the Stineman Coal Mining Company. The empty cars are placed here, 5300, placed in the common yard, and this is Stineman No. 1, here going to No. 3, dropped down to this tippie at No. 1, loaded and dropped below the tippie and taken out to the South Fork yard. This is probably, I would say, about a thousand feet from the main line in here where this side track switches off from the yard of the South Fork Railroad.

Q. How far distant is the Coke Company tippie from the Coal Company?

11 A. I would say 600 feet its No. 2, and its No. 4 practically about 1200 feet. That, of course, can be gotten accurate by taking the scale of the blue print.

Q. What do you call the tippie of the Coal Company?

A. No. 1.

Q. You say cars for all these Stinemans were shoved up the tail track and fed by gravity to the various tipples?

A. Yes sir.

By the COURT:

Q. Is Scalp Level on up that way?

A. No, this is an extension of the South Fork Branch going up here, going up South Fork Creek.

By Mr. LIVERIGHT:

Q. When was the Stineman Coal Mining Company incorporated?

A. January 1st, 1901, it went into business.

Q. Prior to that time had you been in business with your brothers and associates?

A. Yes sir.

Q. Where?

A. At South Fork.

Q. On what property?

A. On the property which was the Stineman Coal & Coke Company lease.

Q. The Stineman Coal & Coke Company lease?

A. Yes sir.

Q. What acreage did that constitute?

A. That originally was about a thousand acres under that lease.

Q. What business did you do for the Coal & Coke Company?

A. We had the contract of placing that coal on the cars at so much a ton.

12 Q. That is Stineman Brothers had?

A. Yes, Stineman Brothers had from some time in 1897 up until 1901.

Q. Who owned the improvements?

A. The Stineman Coal & Coke Company. We purchased those from the Stineman Coal & Coke Company.

Q. Who do you mean by we?

A. Stineman Brothers.

Q. What became of the interests of Stineman Brothers in those improvements?

A. Sold to the Stineman Coal Mining Company.

Q. When was that done?

A. About January 1st, 1901.

Q. Was there any change made in reference to the lease held by the Stineman Coal & Coke Company or did that continue in force?

A. No change. That continued in force and is in force today.

Q. Now what became of the contract of the Stineman Brothers to load coal on the cars for the Stineman Coal & Coke Company?

A. That was assumed by the Stineman Coal Mining Company on January 1st, 1901.

Q. You say it was assumed. Was it carried out?

A. Yes sir.

Q. What kind of cars were loaded by the Stineman Coal Mining Company out of the coal owned or leased by the Stineman Coal & Coke Company?

A. They were cars furnished by the Sterling Coal Company, assigned to the Stineman Coal & Coke Company. The Stineman Coal Mining Company removed the coal from the lease of the Coal & Coke Company and was supposed to load it in the cars furnished by the Sterling Coal Company to the Stineman Coal & Coke Company.

Q. Did the Stineman Coal Mining Company have anything to do with obtaining the cars on which this coal was placed?

13 A. The Stineman Coal Mining Company relied entirely upon the Pennsylvania Railroad system cars. No other source of supply.

Q. Answer the question please. Did the Stineman Coal Mining Company have anything to do with the arrangement or contract for the cars to be loaded for the Sterling Company?

A. No sir.

Q. Between what parties were those arrangements made?

A. Between the Stineman Coal & Coke Company and the Sterling people.

Q. How did those cars come in?

A. They were assigned to the Stineman Coal & Coke Company's mines.

Q. By whom?

A. By the Sterling Coal Company.

Q. Where was the Sterling Coal Company situated?

A. Philadelphia.

Q. What classes or characters of cars were these that were loaded for the Sterling Company?

A. Cornwall & Lebanon cars.

Q. Any other class?

A. No, I think not at that time. I don't know whether they sent in their Sterling cars or not, Sterling individual, I am not sure.

Q. Did those C. & L. cars come into the same yards as the cars intended for your operation?

A. Yes sir.

Q. Were they shoved up on the same tail track?

A. Yes sir.

Q. And how did they reach the tipples of the operating company?

A. They were dropped by gravity into the different tipples to the different mines.

Q. What was the arrangement between Stineman Coal Mining Company and the Stineman Coal & Coke Company with reference to the loading of these consigned cars?

A. Not any arrangements. The Coal & Coke Company loaded their coal into the C. & L. cars or Sterling cars as we know them.

Q. You didn't load them for them free of charge, did you?

A. No sir, we did not.

Q. Give the arrangement, please?

A. The Stineman Coal Mining Company on the coal they mined from the lease of the Coal & Coke Company was loaded in the Sterling cars at a contract price.

A. I think it was 80 cents a ton, if I remember rightly, at that time. It varied on sliding scale prices.

Q. Did the Stineman Coal Mining Company have any interest whatever in the sale of the coal that was loaded in the C. & L. cars for the Coal & Coke Company?

A. Nothing at all.

Q. Did it have any interest in them beyond the receipt by it for the contract price for loading?

A. No.

Q. How long was that contract price maintained?

A. I can't recall that.

Q. Was it changed at any time?

A. The contract was on a basis of the miners' wages, rise and fall. In other words, a sliding scale.

Q. That is, if the wage scale increased, the price for loading the coal increased?

A. Yes sir.

Q. And *visà versa*?

A. Yes sir.

Q. Did all the coal for loading of the C. & L. cars come out of coal territory not owned or leased by the Stineman Coal Mining Company?

A. It came from the lease of the Stineman Coal & Coke Company.

15 Q. Was that ever transferred or taken over in any way by the Stineman Coal Mining Company?

A. You mean the leasehold?

Q. The leasehold?

A. Oh no.

Q. Over what improvements was this coal loaded for market?

A. Over the improvements of the Stineman Coal Mining Company.

Q. State whether or not the contract price of 80 cents a ton covered the use of the improvements as well as of loading?

A. Yes sir.

Q. What territory did the Stineman Coal Mining Company have under control?

A. They had about 1200 acres, lying west of the lease of the Stineman Coal & Coke Company.

Q. From whom did they lease?

A. They leased that from J. C. Stineman.

Q. When?

A. In 1901, January 1st.

Q. What kind of coal was that?

A. Miller or bed B as it is commonly known.

Q. State whether or not the coal is persistent in that acreage?

A. It is.

Q. What is the height of it?

A. It runs from 3 feet 6 to 4 feet.

Q. State whether or not it is out of that lease that the coal loaded between 1902 and 1905 by the Coal Company came?

A. It is out of that lease. Lease made to the Stineman Coal Mining Company.

Q. What equipment did the Coal Company have at its mines with which to operate?

A. They were equipped with electricity and rope haulage.

16 Mr. LIVERIGHT: It is agreed by Counsel for plaintiff and defendant that the coal operation of the Stineman Coal Mining Company was so equipped that during the period of the action it could have mined its rating as fixed by the defendant company.

Mr. GOWEN: Subject, of course, to the ordinary minor interruptions.

By Mr. LIVERIGHT:

Q. What was the rating of your mine?

A. 33 cars a day I believe.

Q. How many tons was that?

A. It depended entirely on the kind of cars supplied. The mine at that time had a capacity of from 1000 to 1100 tons a day, which I think was a 10 hour work day at that time.

Q. In 1902, in the month of April, when this action begins, what was the physical capacity or output of your mine with reference to the Stineman Coal Mining Company leasehold?

A. In 1902?

Q. Yes?

A. It ran about 8000 tons a month.

Q. That was the output?

A. That was the output from the lease of the Stineman Coal Mining Company.

Q. What was its productive ability at that time per diem?

A. On April 1st, not any greater than that.

Q. On July 1st, 1902, what was its productive capacity, not its output?

A. Its productive capacity, about 9000 tons.

Q. On September 1st what was its productive ability?

A. In the natural course of events I would say 10,000 tons the month, natural increase of tonnage.

17 Q. I don't mean the natural increase in output but its productive ability?

A. I mean its productive ability was from 10 to 11000 tons in September.

Q. September, 1902?

A. Yes sir.

Q. In the spring of 1903 what was its productive ability?

A. Practically about the same tonnage.

Q. 10 or 11000?

A. Yes, 10 or 11000 tons.

Q. Is that productive ability entirely apart from what was or could be produced on the Stineman Coal & Coke Company lease?

A. That is entirely apart from the Stineman Coal & Coke Company lease.

Q. What was the productive capacity of that property?

A. It ran from about 10 to 11000 tons a month, making a total tonnage of about 20,000 tons.

Q. What kind of cars did you load at the tippie there out of the Coal Company's lease?

A. Pennsylvania cars when we got them.

Q. Is that what is known as system cars?

A. Yes sir.

Q. State whether or not under the rules then in force by the railroad company private cars were counted against distribution?

Mr. GOWEN: I object to the question. The rules are the best evidence, as Counsel knows.

Mr. LIVERIGHT: Counsel knows there were no rules printed or promulgated in that time, 1902.

Mr. GOWEN: That is right, there were no rules.

I understood private cars were not counted against your distribution.

18 By Mr. LIVERIGHT:

Q. From whom did you so understand?

A. Understood it from the railroad people.

Q. Who do you mean by the railroad people?

A. I mean the car distributor, which was the assistant car despatcher at Altoona.

Q. Name these people?

A. Mr. D. Steele was assistant train despatcher at that time.

Q. Did you get that information from any other railroad sources?

A. No sir.

Q. Just Mr. Steele?

A. Yes sir.

Q. State whether you know as a fact that system you have just described prevailed at this time in your vicinity?

A. It did.

Q. How long did that system continue, if you know?

A. I think that continued up until just a few years ago, as far as the Stineman mines are concerned.

Q. That is up until a few years ago private cars were not counted against distribution?

A. Private cars were not counted against the company that owned the plants.

By Mr. GOWEN:

Q. You said were not counted against the companies that owned the plant?

A. Yes sir.

By Mr. LIVERIGHT:

Q. During all that time your company owned the plant?

A. That is the Stineman Coal Mining Company, they owned the plant.

19 Q. Was there any change during this action with reference to the method adopted in mining the Coke Company's coal?

Mr. O'LAUGHLIN: We object to it. What the Coke Company has to do with this we don't know.

By Mr. LIVERIGHT:

Q. During the entire period of this action did the coal of the Coke Company lease continue to be loaded over your tippie?

A. I find that on March, 1903, the Coal & Coke Company took over their own acreage and mined their own coal.

By the COURT:

Q. So that after March, 1903, you were not loading anything from the Coal & Coke Company lease over the tippie of the Coal Mining Company. Is that what you mean?

A. That is what I mean.

By Mr. LIVERIGHT:

Q. I understand you, Mr. Stineman, to say beginning in March, 1903, physically the coal was loaded on another tippie or that the Coke Company then assumed its own pay roll?

A. The Coke Company assumed its own pay roll on March 1st, 1903, and on November 1st, 1903, they loaded their coal on their own equipment, their own tippie.

Q. At another location?

A. Another location. The plants were separated.

Q. On that date there was a complete divorce between the two companies?

A. Yes sir, a complete divorce.

Q. Up until March, 1903, did the Coal Company pay the pay roll of the Coke Company?

20 A. I understand so, yes sir, up until March, 1903 the Coal Mining Company paid the pay rolls of the Coal & Coke Company for the coal which came out of their lease.

By Mr. COLE:

Q. They paid all the expenses; they mined the coal and paid the pay roll and everything else?

A. Yes sir.

By Mr. LIVERIGHT:

Q. How did you get Pennsylvania cars for loading at the Coal Company's operation?

A. By making a demand for them every evening for the supply the next day.

Q. Where did you make that?

A. That demand was made to the assistant train master at Altoona.

Q. How?

A. By telegram or telephone or by furnishing it to their operator at South Fork.

Q. Do you mean by furnishing it to the Railroad Company's operator?

A. Yes sir.

Q. Did you file the demand with him?

A. Always filed the demand with the operator or telephoned it to the office at Altoona.

Q. How frequently was this demand made?

A. That demand was made every afternoon or evening for the supply on the following day.

Q. Who made it?

A. I did.

Q. Did you specify what kind of cars you wanted for the Coal Company?

A. Always specified the cars for the different mines.

Q. Can you tell how many you ordered day by day?

21 A. I cannot. That is too far back.

Q. With references to your capacity to load coal, how many did you order, more or less than that?

A. It was customary among the coal men to order about any wheres for 40 to 50 per cent more than they needed. They ordered a much larger amount probably than what they would load each day.

Q. Why was that?

A. Probably thought they would stand a better chance in getting cars or more of them.

Q. Did you get cars up to the requirements of your mine.

A. Did not.

Q. If you had gotten cars up to your rating, could you have loaded them?

A. Yes sir.

Q. Your rating was 33 cars a day?

A. Yes sir.

Q. Did you order that many?

A. I ordered more than 33. I think the records will show that.

Q. Do you know anything about the supply of cars that went up to the Berwind mines during the period of this action?

A. I do not.

Q. Did you know of any orders issued in their favor in the way of cars?

A. Only hearsay.

Q. From whom did you hear it?

A. That I can't say. That was common rumor among coal men that they were receiving special favors.

Q. Of your own knowledge you don't know what happened?

A. Of my own knowledge I do not.

Q. State whether or not you saw cars going to the Berwind mines apart your switch?

A. I did.

22 Q. With what frequency?

A. They seemed to have full supply. I seen them quite often being hauled over our own switches.

Q. Did you ever take up the question of cars for the Coal Company with any one representing the Railroad Company?

A. I might say that we took up most every day.

Q. With whom?

A. With the car distributor at Altoona or train despatcher.

Q. In what way did you take it up?

A. By simply talking to him over the telephone and telegrams.

Q. What do you mean by taking it up?

A. Took up the question whether they couldn't help us out. Demanded cars because our neighbors were receiving a full supply.

Q. Were you receiving a full supply?

A. No sir.

Q. State whether or not you brought that to the attention of any one for the defendant?

A. Yes sir.

Q. To whose attention?

A. Brought to the attention of the train despatcher.

Q. What was his name?

A. Mr. Steele.

Q. Wasn't he assistant train master?

A. Assistant train master. I think it was brought to the attention of Mr. Creighton, General Superintendent, also brought to the attention of Mr. Trump.

Q. Who is Mr. Trump?

A. I can't recall his official capacity.

Q. Where was he located?

A. Philadelphia, Broad Street Station.

Q. How did you bring it to his attention?

A. It was brought to his attention by myself and the President of the Company, Mr. Whitely.

23 Q. By personal interview?

A. Personal interview.

Q. When did this occur?

A. Sometime in 1903, I believe. I can't recall the date that interview took place.

Q. What was the nature of the interview?

A. Mr. Whitely, as President of the Company, made a demand for a supply of cars for his mine and owing to the Berwind-White people receiving special assignments or full supply of cars, and he was informed in my presence that they intended keeping the Berwind mines supplied with cars regardless of any other shipper.

Q. Who informed him?

A. Mr. Trump.

Q. How long did this interview last?

A. I can hardly recall that. Mr. Whitely objected to that and Mr. Trump said we should sue. Mr. Whitely said that was his own prerogative.

Q. You said Mr. Trump suggested you sue?

A. Mr. Trump suggested we sue.

Q. This was as far back as 1903?

A. Yes sir.

Q. Did you have any other interview with Mr. Trump?

A. No sir.

Q. Or any other operating official at Broad Street Station?

A. No sir.

Q. All your other demands or requests were preferred at Altoona or locally?

A. Yes sir.

Q. Did you get an improvement in car service through these intercessions?

A. Not to my knowledge. I don't remember we did, or we wouldn't be here.

Q. Did you have an interview with Mr. Creighton on the same subject?

24 A. I think not.

Q. How did you take the matter up with him?

A. I think through telegrams. Telegrams passed between the Company and Mr. Creighton.

Q. What quality of coal was mined at the Coal Company's plant?

A. You mean the geological description of it?

Q. Yes.

A. We mine the Miller seam or the B, as commonly known, bed

B.

Q. Was it a low grade coal?

A. Very high grade we think.

Q. About how many operators in that neighborhood have that quality of coal?

A. You mean right in the vicinity of South Fork?

Q. Yes.

A. About four. Four or five.

Q. What is the trade name of these coals?

A. Miller.

Q. Did you have any trade for it?

A. We can sell all the coal we can mine at the Stineman mines and always have been able to sell it.

Q. That condition obtained in 1902, 1903 and 1904?

A. That condition has obtained for twenty years or over, ever since it was a mine opened.

Q. Then your sales and output of coal are limited by what factors only?

A. By capacity.

Q. Capacity and what else?

A. Ask that question again.

Q. I say your ability to load, produce and sell coal are limited by what factors?

A. By the capacity of the mine and conditions.

Q. How about the car supply?

A. And the car supply, of course.

Q. Mr. Stineman, is any of your coal under contract?

25 A. I am unable to say that, as I have nothing to do only with the producing end. Nothing to do with the selling end of the business.

Q. Who sold it?

A. Sold through Mr. Scott, representing the Mining Company at Philadelphia.

Q. Which Scott?

A. Mr. George E. Scott.

Q. Do you know whether there were demands for your coal during this time that were unfilled?

A. I think I answered that question.

Q. Were there demands on you by the representatives to get out more coal?

A. Yes, that is practically all the time.

Cross-examination.

By Mr. GOWEN:

Q. Mr. Stineman, dealing now with the period before March, 1903, was the Stineman Coal & Coke Company then or had the Stineman Coal & Coke Company any tittle over which its coal was shipped?

A. Prior to March, 1902, they had an operation known as No. 2.

Q. No, March, 1903?

A. 1903 also a property known as No. 3. No. 2 I mean.

Q. The Stineman Coal & Coke Company No. 2?

A. Yes sir.

Q. Had the Stineman Coal Mining Company any relation whatever to coal which was shipped from that operation, the Stineman Coal & Coke Company No. 2?

A. No.

Q. Then do I understand that before March, 1903, all the coal which was mined by the Stineman Coal Mining Company for the

Stineman Coal & Coke Company was loaded over the tippie of the Stineman Coal Mining Company?

26 A. Not the lease of which No. 2 mine is located is entirely separate than the leasehold of the Stineman Coal & Coke Company, the coal which passed over the equipment of the Coal Mining Company. There is two leases of the Stineman Coal & Coke Company.

Q. But my question was, whether all the coal of the Stineman Coal & Coke Company which the Stineman Coal Mining Company mined for and loaded on to cars was delivered to cars over the tippie of the Stineman Coal Mining Company?

A. Yes sir.

Q. Now how long did that condition continue?

A. That continued up until November 1st, 1903.

Q. Until November 1st, 1903?

A. Yes sir.

Q. Now let us have no mistake about that. All the coal which you have testified to as mined by the Stineman Coal Mining Company for account of the Stineman Coal & Coke Company came through the improvements or opening of the Stineman Coal Mining Company No. 1, was loaded over its tippie in cars placed at that tippie. Is that right?

A. All the coal that came from the Stineman Coal & Coke Company lease was loaded over the tippie or the improvements of the Stineman Coal Mining Company up until November 1st, 1903. That is your question.

Q. Then all the cars which had been referred to as belonging to the Sterling Coal Company, which you say were loaded with coal of the Stineman Coal & Coke Company, were loaded with that coal at the Stineman Coal Mining Company No. 1 tippie?

A. I understand that question, that all the cars that the Sterling Coal Company—

Q. I am speaking prior to November 1903?

A. All the cars assigned to the Sterling Coal Company?

27 Q. All the cars of the Sterling Coal Company which you referred to in your testimony in chief, which were loaded by the Stineman Coal Mining Company with coal of the Stineman Coal & Coke Company were loaded at the Stineman Coal Mining Company operation No. 1

A. That is the way I understand it, Mr. Gowen.

Q. Mr. Stineman, you are not an officer of the Sterling Company?

A. I am not.

Q. You were not during this period?

A. At any time.

Q. What information have you except hearsay as to the assignment of those cars of the Sterling Coal Company?

A. As director of the Stineman Coal & Coke Company and as their manager, knowing the cars were assigned.

Q. What action was had by the directors of the Stineman Coal & Coke Company on that subject?

A. I can hardly recall the arrangements that existed between the Stineman Coal & Coke Company and Sterling Company.

Q. What arrangement was there between them?

A. Nothing more than what is referred to in the contract between the Stineman Coal & Coke Company and the Sterling Company, in which they agree to furnish the cars.

Q. Have you a copy of that contract?

A. I believe I have.

Q. Will you let me see it?

(Witness produces contract.)

Q. Now, Mr. Stineman, referring again to the manner in which the coal mined from the Coal & Coke Company's leasehold on its account by the Stineman Coal Mining Company was shipped, my understanding is that the leasehold of the two companies adjoin?

A. Yes sir.

Q. That the underground working of the Stineman Coal Mining Company No. 1 operation reached the coal in the Stineman Coal & Coke Company lease?

A. Yes.

28 Q. And that that coal was mined from that leasehold and was transported underground through the Stineman Coal Mining Company's mine and was shipped over its tipple?

A. Yes sir.

Q. Now, after November, 1903, what change occurred?

A. The lease of the Stineman Coal & Coke Company was taken on to the improvement known as the Stineman Coal & Coke Company No. 4. They separated the operation. The coal that was under the lease of the Stineman Coal & Coke Company was then loaded at Stineman No. 4.

Q. So that after November, 1903, the coal from Stineman Coal & Coke Company lease which theretofore had been transported or carried underground to the Stineman Coal Mining Company's operation and shipped over its tipple came out over another tipple?

A. Yes, loaded at No. 4 tipple.

Q. Belonging to the Stineman Coal & Coke Company?

A. Belonging to the Stineman Coal & Coke Company.

Q. Then after that date, after November, 1903, the only coal which was loaded over the tipple of Stineman Coal Mining Company was its own coal?

A. Was out of their own lease, Mr. Gowen.

Q. Mr. Stineman, you were asked as to your ability to ship during the period of the action the output of your mine. Have you got any figures with you showing the actual shipments made over the Stineman Coal Mining Company's No. 1 tipple?

A. I have, yes, sir.

Q. Throughout the period of the action?

A. That is what I am referring to here.

Q. Does that include all coal whether belonging to the Coal & Coke Company or the Mining Company?

A. Yes.

29 Q. Will you give us those figures?

Mr. COLE: I don't think this is cross-examination of this witness. I don't think he is required under his direct examination to make a table of that character for them.

Mr. GOWEN: I am not asking him to make a table, I am asking for figures.

Mr. COLE: It is objected to as not cross-examination.

The COURT: I think we will sustain the objection, note exception for defendant and seal bill.

Mr. GOWEN: That is all for the present.

By Mr. LIVERIGHT:

Q. Mr. Stineman, was there more than one siding or switch into these several operations from the railroad company's tracks?

A. Just the one switch.

Q. How was it designated by number?

A. I think it is No. 5300. I am not so sure about that during 1902 and 3 or the period of this action.

Q. Did that designation apply equally to the Stineman Coal Mining Company's operation and Stineman Coal & Coke Company's operation?

A. I couldn't say. I don't know what they do.

Q. Do you know of any more than one siding number?

A. I do not.

Q. Was there a Stineman Coal & Coke Company No. 1 operation so-called?

A. Not that I know of. Prior to 1901, January 1st, probably this mine of the Stineman Coal Mining Company was designated the Stineman Coal & Coke Company No. 1. I don't remember that.

30 Q. That is prior to the incorporation of the Stineman Coal Mining Company?

A. Yes, the sale to the Stineman Coal Mining Company.

31 JOHN SCOTT, JR., called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your profession?

A. Attorney at law.

Q. Where do you live?

A. Philadelphia.

Q. Were you attorney for the Stineman Coal Mining Company in 1902, 1903 and 1904?

A. I organized the Stineman Coal Mining Company and for a time I was the temporary president of it. I was afterwards the attorney for it. I never was a stockholder or interested in it.

Q. In that capacity did you have any correspondence with the officials of the Pennsylvania Railroad Company in relation to the car supply question?

A. Yes sir.

Q. When?

A. On March 3, 1903, I wrote to S. M. Prevost, Third Vice President of the Pennsylvania Railroad, Broad Street Station, complaining about the car situation and the car shortage for the Stineman Coal Mining Company, together with another company, and especially referring to the fact of the special assignments which were at that time, as I was informed, being made to the Berwind-White Company.

Q. Did you get a reply to that letter?

A. Yes sir.

Q. Under what date?

A. Under date of March 7th, 1903, I received this reply from Mr. Prevost. Shall I read it?

32 Q. Yes, read it?

A. Referring to your letter of March 3rd, since its receipt I have made inquiries of Mr. Trump and learn that you have been receiving since January 1st in the neighborhood of 40 per cent more cars than an equitable division of cars available for distribution would really have been given you. The reason for this can be explained by Mr. Trump, and indeed I would be glad if you would call on him and talk to him about all the matters about which you have written to me. Signed by Mr. Prevost.

Q. As a consequence of that letter did you see Mr. Trump?

A. Some week or 10 days later, in company with my brother, George E. Scott, who was connected with the Stineman Company, had charge of their selling department, I went to Broad Street Station and saw Mr. Trump at his office there.

Q. What position did he hold?

A. I think his title was General Superintendent of Transportation.

Q. What was the subject discussed with him?

A. The car supply or rather their lack of car supply.

Q. Can you narrate that conversation now?

A. Well the question of car supply was generally discussed and Mr. Trump told me finally, it didn't make any difference what we or anyone else might think about it that the Pennsylvania Railroad was going to do business in its own way and that was to take care of Berwind and run all chances.

Q. Was Mr. Trump's attention specifically called to these so-called Berwind assignments?

A. The question of special assignments was discussed there and I referred to these assignments. I remember telling him that my information on the subject was from people who had seen the special orders which had been issued to give Berwind 500 cars a day in preference.

33 Q. Is that the special assignments you were talking about in Mr. Trump's office?

A. That was the particular one I spoke of, although I had a list of others. I don't recall that I discussed them specially with him.

Q. State whether it was in response to your calling his attention to these special orders for 500 cars a day that Mr. Trump made the reply that you have given already?

A. Yes, it was. I told Mr. Trump that I thought it was a remarkable statement to be made by a general officer of the Company and asked him if he understood what it meant and what the risks were they were running, and he said he knew what it meant and knew what the risks were and they were going to take them.

We offer the copy of the letter of the witness to S. M. Prevost, dated March 3rd, 1903, the original of which is in the files of the defendant company. Counsel for defendant stipulates there is no objection, if we omit reference to another company in the same letter.

"PHILADELPHIA, March 3rd, 1903.

S. M. Prevost, Esq., Third Vice President, Broad Street Station, Philadelphia.

DEAR SIR: As attorneys for the — Coal Mining Company and the Stineman Coal Mining Company, I am instructed by my clients to call attention to the inequality in the allotment of cars to the operations of these companies, and to make formal demand for such a car supply as we are entitled to receive from your Company in the ordinary and equitable exercise of its function as a common carrier. The Stineman Coal Company, with its operations at South Fork, has a daily capacity of about 1,200 tons. During the year 1902 it mined and shipped from South Fork 212,000 tons. During the month of January, 1902, 18,800 tons. During January, 1903, we were able to ship from this mine only 12,280 tons. The restriction upon the output was from the same cause, lack of cars. The Stineman Coal Mining Company up to and including February 34 27th received at its works during the month of February only 134 cars. It is easily capable of calculation that on this basis the shipments of either Company cannot be much more than half of our shipments of last year. We cannot object of course to a deficient car supply, which is common at the time for any general cause, either to the region or generally in the trade. We do protest and object most seriously, however, to a method of distribution which gives us a reduced car supply, and restricts our output, at a time when the general shipments of bituminous coal over your road, from this region, are larger than ever, and when miners and shippers in our own regions, under similar conditions, and with the same or less capacity, are actually receiving day by day under so-called special assignment a car supply largely in excess of that received by us. We are informed freely at Altoona, by your officials there, that they are obliged out of general car supply to fill a certain number of special assignments, giving fixed numbers of cars daily to special operators and that our own allotment must come out of what is left after these have been filled. It is easily capable of proof that these assignments are made, and that they are filled, and investigation on your part will disclose the fact that someone in authority is adopting this method of distribution rather than the equitable method which would properly apportion among the operators of the region such cars as are available without distinction or discrimination in favor

of any one as against any other one under like conditions. We desire, however, to call your attention [to] the facts as to our own allotment and ask that we receive at your hands the consideration to which we are fairly and legally entitled.

Respectfully yours,

JOHN SCOTT, JR., Attorney."

Q. Did you have any other correspondence or interviews with the executive officers of the Pennsylvania Railroad Company on the same subject?

35 A. I had one or two interviews with Mr. Prevost on the general subject, but whether they were before or after this one I don't recall.

Q. Was the same matter called to his attention?

A. I remember going to Mr. Prevost's office, I can't recall the date, after we had kept tab on deliveries for a month. Mr. Prevost having given express orders—No, that didn't refer to Stineman. That interview did not refer to Stineman I recall now.

Q. Do you recall any other with reference to Stineman?

A. No sir.

Mr. GOWEN: No cross-examination.

36 GEORGE E. SCOTT called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. Philadelphia.

Q. What is your business?

A. I am not engaged in business at the present time.

Q. In 1902, '3 and '4 what was your business?

A. I was Philadelphia Manager of the Stineman Coal Mining Company, as well as of another company.

Q. Do you know where that mine was located?

A. Yes sir.

Q. Have you been to the mine?

A. I have.

Q. Who was the superintendent on the ground there that had charge of the operation?

A. W. I. Stineman.

Q. Did you know the relation that existed between the Stineman Coal & Coke Company and the Stineman Coal Mining Company as to loading of coal?

A. I did.

Q. State whether or not the coal that was loaded by the Coal Mining Company for the Coal & Coke Company, as testified by Mr. Stineman, in any way belonged to the Coal Mining Company?

A. It did not.

37 Q. What interest did they have in that transaction, merely the loading price?

A. The Coal Company?

Q. Yes?

A. That is all.

Q. Do you know how the cars that were to be loaded for the Coal & Coke Company were delivered to the mine?

A. The only thing I know is from our agreement in the sale of the Stineman Brothers in regard to the cars that were furnished by the Coke Company. It is specified there. Other than that I know nothing.

Q. Were those cars or were they not consigned to the Coal & Coke Company?

Mr. GOWEN: Mr. Stineman says he knows nothing except what the agreement covers.

By Mr. COLE:

Q. Have you that agreement here?

A. There is a copy of it. I haven't it with me. It is among the papers.

By Mr. GOWEN:

Q. Is it this same agreement referred to by Mr. Stineman, that Mr. Stineman handed me?

A. I couldn't say.

By Mr. COLE:

Q. Without going into it now, what class of cars were delivered to the Coal & Coke Company or delivered for the Coal & Coke Company?

A. What was known as C. & L., Cornwall & Lebanon Railroad cars.

Q. Do you know by whom they were owned or controlled?

A. That I couldn't say. I know who controlled the movement of them.

38 Q. Who did control the movement of them?

A. The Sterling Coal Company.

Q. What quality of coal was this that was produced from the mine?

A. The best. Every man, what he sells is the best. It did stand in the market as the first grade coal on the Pennsylvania road.

Q. State whether or not there was a demand for it in the market?

A. There was decidedly.

Q. To what extent now; to the extent that it was produced or capacity to mine, or what extent was the demand?

A. We never had any difficulty in selling all we produced; could have sold far more.

Q. State if during the period that is covered by this action, from April 1st, 1902 to December 1st, 1904, you could have sold the capacity of that mine?

A. We certainly could.

Q. How did it rank in price with other bituminous coal?

A. As a rule it was higher in price than other coal.

Q. Mr. Scott, was the coal that could have been produced over and above what they did produce, up to its capacity, free coal or what is called spot coal that you had a right to sell in the market during that time, or what it contracted at that price?

A. Well we had quite a number of contracts. Of course, we could only deliver on contracts according to what cars we had.

Q. State whether or not those contracts were filled to the satisfaction of your customers with the coal you did produce?

A. All excepting one or two.

Q. How much was that, how much did that represent?

A. That would represent probably 12 to 14,000 tons.

39 Q. Now the balance of the coal, what could you have done with that if it had been produced?

A. We could have sold it on the market.

Q. At the market price?

A. At the market prices. We would take it to distribute on our contracts. We couldn't get away, if we had additional coal, from taking care of our contracts.

Q. What was the prices for coal, can you tell us, from April, 1902, to December 31st, 1904?

A. I could. I haven't that data with me just at the moment. I will get it. It varied all the time.

Q. Was there a flurry in the coal prices during that period?

A. There certainly was.

Q. Explain to the jury what brought that about, what the conditions were?

A. It occurred in this way, that there was a stoppage of work in the anthracite region from some time about the 20th of May until the 15th or 20th of October.

Q. What year?

A. 1902. Of course, there was no production of anthracite coal and winter coming on it made the demand for fuel and the price went up very high.

Q. What was the range of prices during that time?

A. Anywhere from \$1.75 to \$7.00.

Q. A ton?

A. A ton at the mine.

Q. Where was this coal sold, at the mines or delivered; where was your market?

A. We had a market in various places. A great deal of it was sold f. o. b. cars at the mines. There was also coal sold at tide water, which would be tide water price.

Q. Could you have sold and would you have sold the capacity of the mines, if you had cars to load it, at the mines during the period of this action?

A. I believe we could, but we never confined ourselves absolutely to one district.

40 Q. Do you testified [testify] in your judgment you could have sold that, considering the demand of the coal business during that time?

A. I believe we could.

Q. At the mine. You say you have a schedule of these prices made up?

A. I have them somewhere.

Q. Will you find it, we want to introduce it now. Is it the same as you gave before?

A. It is the same I gave in the Puritan exactly.

Q. Did you make up a statement of the average prices during the period that I called your attention to?

A. I did.

Q. Have you anything before you to refresh your recollection as to what that is?

A. I have my evidence in another case.

Q. Does that refresh your recollection?

A. Yes sir.

Q. Now state what those prices were, beginning with April 1902 down to the close of 1904?

A. This is for the average price of coal outside of contract?

Q. Yes?

A. The average price for April, 1902, was \$1.24 per gross ton. For May \$1.45. For June \$2.40. July \$2.19. August \$1.73. September \$2.07. October \$3.73. November \$3.25. December \$4.24. January, 1903, \$4.72. February \$2.69. March \$1.81. April \$1.63. May \$1.53. June \$1.55. July \$1.55. August \$1.48. September \$1.49. October \$1.42. November \$1.45. December \$1.40. 1904, January \$1.35. February \$1.31. March \$1.34. April \$1.31. September \$1.17. October \$1.18. November \$1.17 and December \$1.17.

Q. Could the product of this mine have been sold at the average prices that you have indicated there, if you had had cars to ship it?

A. I could.

41 Q. Mr. Scott, are you able to tell from your connection with the Company what the cost of producing this coal was?

A. Yes sir.

Q. Will you tell us that?

A. In 1902, April it cost 94.9 cents, plus a royalty of 10 cents. May 95.5 cents. We have to add the royalty to all these figures. Royalty of 10 cents. June 92.9 cents. July 92.8 cents. August 93.1 cents. September 97.3 cents. October 97.5 cents. November \$1.12 8/10. December 98.8 cents. In 1903, January \$1.11 1/10. February \$1.21 4/10. March \$1.04 6/10. April \$1.13 8/10. May \$1.06 3/10. June \$1.14 1/10. July \$1.13. August \$1.06 8/10. September \$1.09 4/10. October \$1.12 3/10. November \$1.01 5/10. December \$1.14 1/10. 1904, January \$1.17 4/10. February \$1.07 6/10. March \$1.02 7/10. April \$1.04 5/10. May \$1.00 1/10. June \$1.02. July \$1.10 1/10. August 96.1 cents. September 96.3 cents. October 92.6 cents. November 98.7 cents. December \$1.07 3/10.

Q. Mr. Scott, are you familiar enough with the operation of the mine to state what the effect on the cost is in cutting down your production, not being able to produce your capacity?

A. Of course, that is a running proposition. I could only judge

by using my own judgment. The greater the production would reduce your cost.

Q. Mr. Scott, during the period covered by this action, did you know of the alleged shortage of cars at this mine?

A. Yes, I would receive word of the shortage all the time.

Q. What did you do about that to try to correct it?

A. I used all the efforts I could to get an increased supply.

Q. Who did you approach?

42 A. I went to various men, officials at Broad Street. I think once or twice I visited Mr. Creighton at Altoona.

Q. What railroad was this mine compelled to ship over?

A. The Pennsylvania.

Q. Had it any other outlet?

A. No sir.

Q. When you went to Mr. Creighton what complaint did you make to him?

A. Well the complaint was we weren't getting sufficient cars to take care of the tonnage we could produce at all, not sufficient for our rating.

Q. What reply did he make?

A. Well I can't recall further than he might have said he was doing the best he could.

Q. State whether or not you complained that other people were getting a preference over you?

A. I complained of a special allotment.

Q. To whom?

A. I complained to Mr. Creighton.

Q. Who was this special allotment made for?

A. It was general talk that certain shippers were getting special allotment.

Q. Who were they?

A. Well Berwind-White.

Q. Did you call his attention to the Berwind-White order?

A. I certainly did.

Q. What did you call a special allotment, what do you mean by that?

A. The cars are to be taken out of what they have before they commence distribution.

Q. That is an allotment not made pro rata but arbitrarily, allotment of so many cars made to the individual, in this case it was Berwind-White?

A. Before they commence distribution.

43 Q. The railroad company, state whether or not they had cars enough during the strike to go around and give everybody all the cars they wanted?

A. I wouldn't think so. I don't know.

Q. Well they didn't do it any way?

A. They didn't do it.

Q. And their excuse was they didn't have cars during that stream time, and that is the time is it that they pretended to distribute them pro rata?

A. That is the time the special allotments.

Q. They pretended they were distributing them pro rata?

A. That is right.

Q. And instead of doing that this special allotment was taking out so many cars before any distribution was made?

A. That is correct.

Q. Do you know what this Berwind-White special order was?

A. It varied according to the increase in the production out of their district.

Q. Do you remember of any one particular special order you called their attention to?

A. Five hundred cars a day, I did.

Q. What did they say about that?

A. Well they was always very silent on that subject.

Q. Was you ever at Broad Street Station talking to any of the people about it?

A. I was.

Q. Was you along with John Scott, Jr., when he called the attention of Mr. Trump to this fact?

A. I was with Mr. John Scott, Jr., to visit Mr. Trump one day.

Q. What conversation took place there?

A. We went at the request of Mr. Prevost.

Q. Who was he?

44 A. I think he was Third Vice President. He was one of the Vice Presidents, and after going into the room and after passing the compliments of the day, the first thing Mr. Trump said was, there is no use in bringing up the Berwind-White business, that we are determined to protect that at all hazards.

Q. Had there been previous complaints made to him about this special allotment to Berwind-White?

A. I think there had.

Q. The first thing he said was there was no use in taking that up. What did Mr. Scott say in reply?

A. He replied it was a remarkable statement for an official of the railroad to make, and Mr. Trump's reply was they knew exactly what risks they were taking and were prepared to take them.

Q. From all these complaints did you get any substantial relief?

A. Not any material relief.

* * * * *

45

Letters.

"December 1, 1902.

"M. Trump, Esq., General Superintendent of Transportation, Pennsylvania Railroad Company, Philadelphia.

"DEAR SIR: We beg to call your attention to the matter of car supply for the Stineman Coal Mining Company, at South Fork, Pennsylvania. Almost two years ago we furnished you with a blue print of the tracks at Stineman No. 1 mine, which are owned by the Stineman Coal Mining Company. We also stated that we were loading 15 cars daily for the Sterling Coal Company on account of the

Stineman Coal & Coke Company. The Stineman Coal & Coke Company were to furnish 15 cars daily or 20 cars at the maximum of Sterling Coal Company or of C. & L. Railroad cars. We would remind you of the fact that the Stineman Coal & Coke Company do not have any control or rights whatever over the storage sidings, and we cannot permit them to be blocked with the empty cars of the Sterling Coal Company while we are shut out entirely of Pennsylvania cars. We would also state that we cannot accept Sterling or C. & L. cars beyond this agreement, and if Pennsylvania cars are not furnished for the balance of our tonnage, we will suspend work at the mines until Pennsylvania cars are supplied. We will not allow the Sterling and C. & L. cars to be stored on our siding.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.

"GEORGE E. SCOTT, *Manager.*"

"January 30th, 1903.

"George W. Creighton, Esq., General Superintendent Pennsylvania Railroad Company, Altoona, Penna.

"DEAR SIR: We beg to advise you that on and after February 1 we will not load the cars of the Sterling Coal Company or C. & L. Railroad at Stineman No. 1 mine, at South Fork, but will confine the loading to Pennsylvania Railroad cars.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.

"GEORGE E. SCOTT, *Manager.*"

February 10th, 1903.

"M. Trump, Esq., General Superintendent Transportation P. R. R. Company, Broad Street Station.

"DEAR SIR: Noting from your published list of stations and sidings that the siding at South Fork, known officially as No. 5300, on which siding are the mines of the Stineman Coal Mining Company and the Stineman Coal & Coke Company, and in view of the fact that these two companies are two distinct and separate corporations, with diverse interests and different stockholders, we beg to request that as the coal of the Stineman Coal Mining Company is

46 mined from collieries Nos. 1 and 3 on siding known as No. 5300, that your Company designate the sidings of the Stineman Coal & Coke Company with some other number, as it is evident on account of the few P. R. R. cars we receive, there is some confusion or misapprehension in your operating department as to the standing of these two companies, which are distinctly separate to each other in their interests. The Stineman Coal Mining Company only load P. R. R. cars and their allotment, as we understand, is 33 cars per day, and we respectfully ask that the rating be increased to at least 40 cars, as we not only have the capacity but the equipment and the business to take care of this tonnage every day. We make this suggestion in order to work in close touch with your Company, and to avoid any confusion of other interest at South

Fork. In view of the fact that the brick works is on the same siding No. 5300, it seems to us to be advisable to give that company a separate number.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.

"GEORGE E. SCOTT, *Manager.*"

"February 12th, 1903.

"George W. Creighton, Esq., General Superintendent Pennsylvania Railroad, Altoona, Pennsylvania.

"DEAR SIR: We note by the railroad report that requisition was made at South Fork yesterday for No. 3 mine for Pennsylvania or individual cars. This is certainly in error, as our people at South Fork advise us that such requisition was not filed and the application must have been changed by some railroad man at South Fork. We understand that No. 3 mine has never asked for anything but Pennsylvania cars and we would like you to take it up and see who changes our requisition.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.

"GEORGE E. SCOTT, *Manager.*"

I read the following telegrams into the record:

"February 4, 1903.

"M. Trump, General Superintendent of Transportation Pennsylvania Railroad Company, Philadelphia, Pa.:

47 "We have following telegram from Stineman Coal Mining Company, Portage. Have not received any cars today. Other mines in this district fairly supplied with Pennsylvania Railroad cars. Railroad people claim they do not have the cars to give us; only reason given.

(Signed)

"JAMES S. WHITELEY,

"*Vice-President.*"

"January 25th, 1904.

"M. Trump, General Superintendent Transportation Penna. Railroad Company, Broad Street Station, Philadelphia:

"We have not been getting for the last thirty days cars to work over half the capacity of the Stineman Coal Mining Company No. 1 mine daily. We only received eight steel cars today. We can load twenty steel cars every day at this point. Why is it we do not get them. Please reply.

"JAMES S. WHITELEY, *President.*"

"February 26th, 1903.

"W. W. Atterbury, General Manager Penna. Railroad Company, Broad Street Station, Philadelphia:

"The Stineman Coal Mining Company have received no cars since our conversation Tuesday. In addition to this, Mr. Clark at Altoona

telephoned Mr. Stineman at South Fork last night that he did not expect to give him any cars this week. I regret to annoy you with these matters, but in view of conversation with you think it no more than fair that I should keep you advised of situation as we will have to take some action to protect our interests as far as the attitude of Mr. Trump and his associates is concerned.

"STINEMAN COAL MINING COMPANY."

"December 29th, 1904.

"W. W. Atterbury, General Manager Penna. R. R., Philadelphia, Pa.:

"Stineman reports Altoona says no cars Friday for South Fork. In view of the fact that our neighbors are working, and loaded coal trains are passing South Fork daily, we are forced to believe that your Company fails to appreciate our position as to contracts, and we must request something definite as to your policy toward Stineman Coal Mining Company.

"JAMES S. WHITELEY, *President.*"

"December 31st, 1904.

"W. W. Atterbury, General Manager Penna. R. R., Philadelphia, Pa.:

"Stineman reports no cars at South Fork today. We positively refuse to submit to this treatment without some better explanation than we have heretofore received from your Company. Answer.

"JAMES S. WHITELEY,

"*President Stineman Coal Mining Company.*"

48 GEORGE W. CLARK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

* * * * *

Q. Did you know during that period of special orders being issued for the Berwind-White Coal Mining Company?

A. Yes.

Q. Were those orders carried out?

A. No sir.

Q. As far as you had cars to carry them out, were they carried out?

A. Without there were conditions along the railroad that made it impossible for us to carry them out.

Q. When it was possible, they were carried out, were they?

A. When it was possible, they were carried out.

* * * * *

49

Statement by Mr. Cole.

Mr. COLE: I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want.

50

"EXHIBIT D."

* * * * *

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under the scheme in force; but it applied a system or practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

* * * * *

51

STINEMAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,

Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the additional portions of the record as required by præcipe filed by Defendant in Error, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia this 17th day of December, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

52

[Endorsed:] File No. 23,924. Supreme Court U. S., October term, 1913. Term No. 289. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Stineman Coal Mining Company. Additional record ordered to stand as return to writ of certiorari. Filed March 23, 1914.

Endorsed on cover: File No. 23,924. Pennsylvania Supreme Court. Term No. 289. The Pennsylvania Railroad Company, plaintiff in error, vs. Stineman Coal Mining Company. Filed October 30th, 1913. File No. 23,924.



Office Supreme Court, U. S.

FILED

MAR 16 1914

JAMES D. MAHER

CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO ~~776~~, OCTOBER TERM, 1913.

289-11

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

VS.

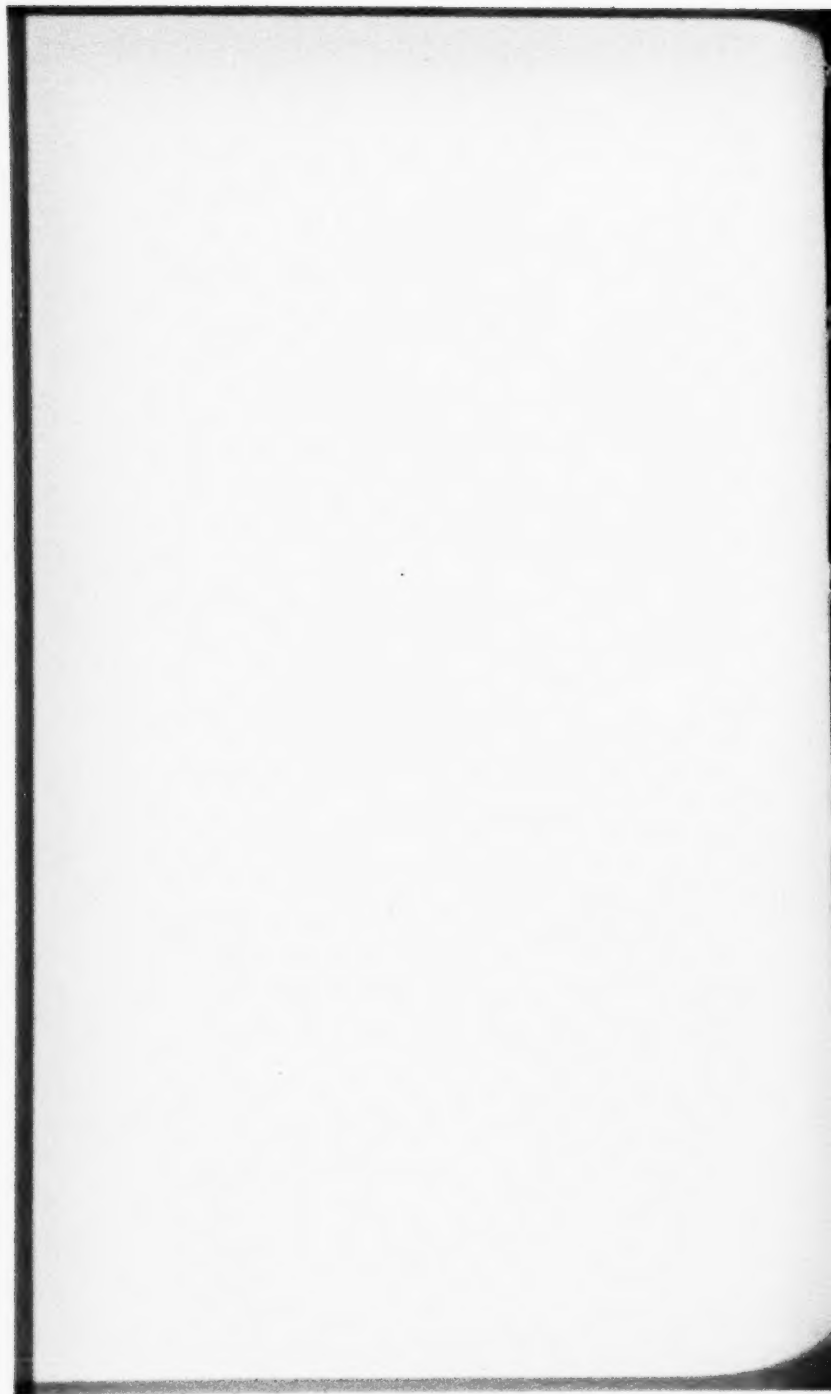
**STINEMAN COAL MINING COMPANY,
DEFENDANT IN ERROR**

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

A. M. LIVERIGHT,

A. L. COLE,

Counsel for Deft. in Error.



**IN THE SUPREME COURT OF THE
UNITED STATES.**

NO 773, OCTOBER TERM, 1913.

**THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.**

vs.

**STINEMAN COAL MINING COMPANY,
DEFENDANT IN ERROR**

**PETITION ALLEGING DIMINUTION OF THE
RECORD AND MOTION FOR WRIT
OF CERTIORARI.**

**A. M. LIVERIGHT,
A. L. COLE,
Counsel for Deft. in Error.**

IN THE SUPREME COURT OF THE
UNITED STATES

OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA
V.
THE UNITED STATES

ON PETITION FOR WRIT OF HABEAS CORPUS

FILED FOR RECORD

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Washington, D.C., this 1st day of January, 1901.

JOHN M. HARLAN

Chief Justice

By the Court, JOHN M. HARLAN, Chief Justice

**IN THE SUPREME COURT OF THE UNITED
STATES.**

**The Pennsylvania Rail-
road Company plain-
tiff in error
versus
Stineman Coal Mining
Company,
Deft. in Error.**

No. 773, October

Term 1913.

Comes now the said defendant in error by A. M. Liveright and A. L. Cole, its counsel and suggests diminution of record in this case, to-wit: That certain evidence of record in the Supreme Court of Pennsylvania is omitted from the transcript on file in this court, that said evidence is indicated as follows:

(1) Testimony of W. I. Stineman pages 2a to 25a inclusive in exhibit "A" attached to praecipe of plaintiff in error.

(2) Testimony of John Scott, Jr., pages 25a to 29a inclusive in the same exhibit.

(3) Testimony of George E. Scott page 33a cross examination at page 41a of the same exhibit, inclusive.

(4) Letters, beginning at the foot of page 29a with
3.

the words "December 1st, 1902, M. Trump, Esq." and continuing through pages 29a, 30a, 31a, 32a, and 33a, of the same exhibit to the testimony of George E. Scott.

(5) Excerpt from the testimony of George W. Clark, beginning with "Did you know during that period of special orders being issued for the Berwin-White Coal Mining company at page 53a to the words "when it was possible they were carried out" at top of page 54a of the same exhibit.

(6) Statement by Mr. Cole on page 54a of the same Exhibit, reading, "I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want.

(7) Excerpt from the Defendant's Exhibit "D" in said Exhibit "A" beginning with the paragraph opening "the complainant alleges that the system" at the fifth line at the foot of page 121a and concluding with the words must have accrued" at the middle of page 122a.

That by inadvertence on the part of the defendants in error's attorneys and by a misunderstanding of the rules of this court they were under the impression that they had ninety days from the time of service of the plaintiffs in errors praecipe on them, designating the part of the record to be sent up within which to file their counter praecipe, believing that the proceeding was under rule 9 section 10, and thereby allowed the ten days to expire in which they should have filed their counter praecipe under section 1 of rule 8 of

the Rules of Practice of this court.

That upon discovering their mistake the defendants in error applied to a Justice of the Supreme Court of Pennsylvania, for an enlargement of the time in which to file their counter praecipe, which application was granted by the Honorable John P. Elkin, Justice of said Court as appears by schedule hereto attached, setting forth the order of said justice.

That defendants in error's attorneys are now advised that said order is not effective to make the transcript so returned a part of the record of this court.

That the parts of the record so omitted are material and absolutely essential to the proper understanding and decision of this cause.

WHEREFORE, the said defendant in error moves the court under rule 14 to award a writ of certiorari to be issued and directed to the Judges of the Supreme Court of Pennsylvania, commanding them that searching the record and proceedings in said cause they forthwith certify to this court those parts of said record so omitted as aforesaid.

A. M. LIVERIGHT,

A. L. COLE,

Attorney, Deft. in Error.

CLEARFIELD COUNTY, ss.

Personally came before me the subscriber, A. L. Cole and A. M. Liveright, attorneys for the defendant in error, who being duly sworn, say that the facts

set forth in the foregoing motion are true.

Sworn and subscribed

this day of March 1914.

J. M. BRYAN,
Justice of the Peace

EXHIBIT "A"
IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT

Clark Bros. Coal Mining
Company

vs.

Pennsylvania Railroad
Company

Appellant.

January Term, 1913.

No. 53.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania.

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Clark Bros. Coal Mining company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad company, on September 23, 1913 served a copy of the praecipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record

upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter praecipe of the defendant in error; that by inadvertance, Counsel for the defendant in error failed within 10 days of service upon them of the praecipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter praecipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter praecipe may be enlarged by the Judge of the Court whose decision is made the subject of review, or by a Justice of the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their praecipe until the 6th day of December, 1913.

And they will ever pray.

(Signed).

A. M. LIVERIGHT,
A. L. COLE.

State of Pennsylvania

ss.

County of Clearfield.

A. M. Liveright, one of the petitioners being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

(Signed) A. M. LIVERIGHT.

Subscribed and sworn to before me this 15th day of November, 1913.

JAMES K. HORTON,
Notary Public.

EXHIBIT "B".

ORDER OF COURT

day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the praecipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as part of the transcript of the record and be therein incorporated.

(Signed). JOHN P. ELKIN.

In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 289.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Stineman Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Pennsylvania Railroad Company, the plaintiff in error, and defendant below, was during the period of the action a carrier of bituminous coal from mines in Pennsylvania to points both within and without that State, and the Stineman Coal Mining Company, the defendant in error and the plaintiff below, was a shipper over its lines to points both within and without that State.

The Railroad Company throughout the period of the action made a *pro rata* distribution of its coal cars among its

shippers, and the present action was brought to recover damages because of its failure, as alleged, to give to the Coal Company its proper share of the cars which had been distributed

The Railroad Company had made no segregation of its cars as between interstate and intrastate shipments, and under the distribution made the cars delivered to each shipper were available at its election for either interstate or intrastate shipments. (Transcript of Record, page 27.)

As to the use that would have been made of the additional cars which the Coal Company claimed should have been delivered to it, the parties stipulated as follows:—

“It is admitted by the parties that although substantially all of the plaintiff's coal on account of which recovery is sought would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania.” (Transcript of Record, page 27.)

The Railroad Company contended that because of the conditions referred to, the State Court was without jurisdiction to entertain the plaintiff's action, and that even if it had jurisdiction of the claim to the extent to which it was based upon the non-receipt of cars which would have been used for intrastate service, cars which would have been consigned by the Coal Company to points outside the State of Pennsylvania should be treated as cars for interstate use even although title to the coal which would have been transported therein would have passed from the Coal Company to the purchaser at the mines at which it was loaded.

These contentions were overruled by the trial Court and by the Supreme Court of Pennsylvania.

Included in the cars which the Railroad Company had delivered to the Coal Company were certain cars owned by the latter, and under the system of distribution which had prevailed during the period of the action, cars of this character were ignored by the Railroad Company in determining the number of its own cars which the Coal

Company was entitled to, and the Railroad Company should have delivered to the Coal Company the same percentage of its own cars which would have been delivered to it had it not received its own private or individual cars.

The propriety of the Railroad Company's system of distribution which thus ignored the individual cars came before the Interstate Commerce Commission in a proceeding instituted by certain shippers on its lines, and the Commission held, to quote from the *syllabus* of that case, as follows:—

"The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use, and that foreign railway fuel cars assigned to a particular mine cannot be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them." (Transcript of Record, page 42.)

Upon the trial of the present case the parties entered into a stipulation practically to this effect, that if the private cars of the defendant in error should not have been counted as against its distributive share of cars available for distribution, then it was entitled to a verdict for \$12,500, but that if these cars should have been counted, then it had received all the cars to which it was entitled, and was consequently not entitled to recover any damages in the present action. (Transcript of Record, page 68.)

The trial Court held that the Railroad Company was bound by the system of distribution which it had in force and was estopped from questioning the right of the defendant in error to all of the cars properly deliverable to it under this system, notwithstanding the fact that the Interstate Commerce Commission had determined that the owners of private cars got an unfair advantage under the system. A verdict, therefore, was entered in favor of the defendant in error under the stipulation referred to, and the judgment entered thereon was affirmed by the Supreme Court of Pennsylvania.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same.”

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:

“1. The plaintiff is not entitled to recover because this Court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the “Interstate Commerce Acts,” in the Federal tribunals.’”

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

“3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:

“2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant.’”

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

"'4. Under the law and the evidence the plaintiff is not entitled to recover.'"

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"5. The Court below erred in overruling the defendant's motion for judgment *non obstante veredicto*."

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"6. The Court below erred in entering judgment on the verdict in favor of the plaintiff."

ARGUMENT.

JURISDICTION OF THE STATE COURT TO ENTERTAIN THE ACTION.

The plaintiff in error, both in the trial Court and in the Supreme Court of Pennsylvania, challenged the jurisdiction of the Court to entertain the action upon the same grounds which formed the basis of its objections in the case of Puritan Coal Mining Company which has been already argued in this Court and in the case of the Clark Brothers Coal Mining Company, which will doubtless have been argued at the time the present case is heard by this Court. We shall not therefore repeat here what has already been presented to this Court in support of our contentions in those cases.

It was duly shown by the testimony in the case that the Railroad Company was both an interstate and intrastate transporter of bituminous coal, and as to the extent to which its coal cars were used interchangeably for both interstate

and intrastate transportation Mr. M. Trump, who during the period of the action had been General Superintendent of Transportation of the plaintiff in error, testified as follows:—

"Q. Were you also familiar with the method of distributing cars by the defendant during those years, to shippers?

"A. Yes, sir.

"Q. Was there but one distribution made, leaving the question of the use of the car as between shipments to points within the State and shipments to points without the State at the option of the shipper?

"A. Yes, sir.

"Q. The Company distributed its cars without any restriction, then, as to the use to which they should be put?

"A. Yes, sir.

"Q. As between intra and interstate shipments?

"A. We didn't know where they were going to when distributed.

"Q. And you didn't prescribe what use the shipper should make of them?

"A. No, sir." (Transcript of Record, page 27.)

DEFENDANT IN ERROR RECEIVED ALL THE CARS PROPERLY DEMANDABLE BY IT.

By the agreement of counsel which will be found at page 68 of the Transcript of Record, it was stipulated that a verdict should be taken in favor of the plaintiff subject to certain questions of law which were thus stated:—

"1st. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

"2nd. As to whether or not the rules prescribed by the Interstate Commerce Commission, and their

various orders which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that, if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant *non obstante veredicto*."

It appears, therefore, that the parties agreed that if the defendant in error should have been charged with the individual cars received by it, the final judgment to be entered should be in favor of the plaintiff in error. In effect this stipulation amounts to this; that if the system or method of distributing cars prescribed and enforced by the Interstate Commerce Commission as disclosed by the various reports and orders of that Commission which were given in evidence upon the trial is that which the plaintiff in error in the period of the action should have conformed to, then the cars delivered to the defendant in error comprised all those which it was entitled to. The system or rule of distribution which has been approved by the Interstate Commerce Commission was thus defined by the Commission in the order which it made in one of the earlier cases that came before it, that of Railroad Commission of Ohio *vs.* The Hocking Valley Railway Company. (Transcript of Record, page 64.)

"It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than

the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars."

And in a proceeding in which the system of distribution pursued by the plaintiff in error was under consideration, the rule promulgated by the Commission which we have quoted above was held by it to be applicable to the plaintiff in error, and an order was made requiring it to take into account all private or individual cars delivered to shippers in the determination of the number of its own cars which should be delivered to them. It was not of course denied by the defendant in error, or by either the trial Court or the Supreme Court of Pennsylvania that the Interstate Commerce Commission was empowered to deal with the question of car distribution and to make whatever orders seemed to it proper in order to bring about a distribution of equipment in times of car shortage which would not offend against the provisions of the Interstate Commerce law.

If there would otherwise have been any doubt as to the existence of this power, the decision of this Court in the case of *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S., 452, has made the existence of such a power no longer a disputable question.

It was urged, however, upon behalf of the defendant in error that as there had been no ruling of the Interstate Commerce Commission requiring that private cars of a shipper should be counted in determining his quota of the carrier's cars prior to the expiration of the period of the present action, the rights of the defendant in error were to be determined with reference to the system of distribution which the plaintiff in error had in force during such period regardless of the consideration that this system was thereafter held to be violative of the requirements of the Interstate Commerce Act, and this view or contention was sustained by the trial Court and by the Supreme Court of Pennsylvania.

In the Puritan Coal Mining Company case which is now before this Court, an issue similar to that which we are considering was raised and presented. In that case it was not contended by the Railroad Company that the counting of the individual cars received by the Puritan Company would have established that that Company had received all the cars it was entitled to, but it was contended that it would have very largely reduced the number which the Court found it should have received and upon which the damages were ascertained and based.

In disposing of the issues raised in the Puritan case the Supreme Court of Pennsylvania called attention to the fact that the period of the action antedated any rulings or orders of the Commission which required private cars to be counted, and determined the point in controversy by holding that the Railroad Company under these conditions was estopped from questioning the correctness or legality of the system of distribution which it had itself promulgated and put in force.

That Court also held in that case that the Railroad Company was at fault in not having raised the question of the private cars earlier than it had.

That in that case the Supreme Court of Pennsylvania was of the opinion that if the action of the Commission had antedated the period of the action its findings would have to be accepted as controlling and consequently the private cars would have had to be counted, will hardly be denied, for in its opinion it said:—

“While proper deference to the Interstate Commerce Commission would require our State Courts to regard the furnishing of private cars as a fair equivalent of the same number of company cars, the fact that such cars were furnished as the pleadings stood in this case was purely a substantive matter of defense.”

There can of course in the present case be no such technical question as that to which reference is made in the extract from the opinion just quoted, and it is to be assumed, therefore, that the Supreme Court of Pennsylvania in the present case reached the conclusion that proper deference to the opinion of the Interstate Commerce Commission did not require that the private cars of the defendant in error should be counted solely because of the fact that the Commission had made no deliverance to this effect until after the close of the period of the action.

The view of the Supreme Court of Pennsylvania clearly presupposes that a carrier was not required in order to avoid discrimination or preference prohibited by the provisions of the Interstate Commerce Act, to count private or individual cars as against the quota or allotment of the shippers receiving them and that it did not become its duty to do so until the Interstate Commerce Commission found and declared that such cars must be counted. Upon no other theory or hypothesis, we submit, can the conclusion of the Court be sustained.

The defect or vice of this view is of course that it overlooks or disregards the fact that the finding of the Interstate Commerce Commission that the counting of private cars was necessary to avoid preferential treatment of ship-

pers and any order made thereon, necessarily had as its basis a conclusion or finding upon the part of that body that this was necessary in order that the carrier should conform to the obligations and prohibitions contained in the Interstate Commerce Act.

It results from this consideration that the obligations and prohibitions which in the judgment of the Interstate Commerce Commission required that private cars should be counted were in existence and operative throughout the whole period of the action in the present case, although action by the Commission thereon was not taken until after the close of the period.

If this were not the case and if consequently the rules or system of distribution which the plaintiff in error had in force during the period of the action did not offend against the provisions of the Interstate Commerce Act, where would the Commission have found its authority for interfering with this system? For the power conferred upon it by the Interstate Commerce Act to prescribe regulations to be followed by a carrier in respect to the distribution of its equipment can only be exercised in case the Commission finds an existing regulation or practice to be "unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act."

When the Commission determined the system of distribution which the plaintiff in error in the present case should follow it prefaced its order by a finding that the system which had been in force was unduly discriminatory and preferential, and even if there was any warrant for the view which the Supreme Court of Pennsylvania apparently holds that the reports and orders of the Interstate Commerce Commission can be alone considered in determining whether some practice or regulation of a carrier offends against the provision of the Interstate Commerce Act, why should a distinction be drawn between the effect of a finding of the Commission that past actions or practices are discriminatory, and of an order directing the discontinuance of these in the future?

The Commission itself has not hesitated to make its find-

ings retroactive in the sense that when it has found that a practice or regulation of a carrier was violative of the Interstate Commerce Act it has treated such finding as applicable to the period prior thereto and has awarded damages accordingly. And yet if the finding of the Commission is to be regarded as speaking or operative only from its date, how could such awards of damages be justified?

Both the trial Court and the Supreme Court of Pennsylvania rested their conclusions in part upon the view or theory that the plaintiff in error, having established a system of distribution which it thought for its own interests, was estopped from alleging or proving that this system was not a proper one, notwithstanding the fact that it had been declared improper by the tribunal especially authorized by Congress to pass upon and determine this question.

In the first place it is to be said of this view or theory that it is based upon the wholly inadmissible proposition that a carrier can by its acts or regulations estop itself from denying an undue preference or advantage to a shipper. But irrespective of this consideration there is really no question of estoppel involved in the case. The plaintiff in error under a mistaken view as to the relative rights of shippers assumed that a shipper who was the owner of private cars had a right to the exclusive use of these cars, and that such ownership and use did not debar him from receiving the proportionate part of the carrier's own equipment or cars to which his requirements or demands entitled him. It therefore established and promulgated a system of distribution of its cars which recognized the rights of the private car owner as it had construed them.

But what theory of estoppel can fairly be invoked to prevent the carrier itself from questioning or denying the lawfulness of the system because of its disregard of obligations imposed upon it by the enactments of Congress? If its system did disregard such obligations, the carrier, we submit, was not bound by it nor could any shipper lawfully claim that the system must be enforced for his benefit.

The Supreme Court of Pennsylvania has wholly ignored the consideration that the provisions against discrimination contained in the Interstate Commerce Act are intended to be as effective against shippers as against carriers, and if, therefore, the plaintiff in error's system of distribution which the defendant in error relies upon as the basis for its claim in the present action secured for it an undue advantage of preference, it cannot, we submit, insist upon its right to hold the plaintiff in error accountable to it for non-compliance therewith. And this, we submit, is true, even though as the result of the enforcement of this view, the defendant in error should be deprived of an advantage which may have been extended by the plaintiff in error to other owners of private cars during the period of the action as the result of the delivery to them of all of their private cars and in addition of their quota of its own cars ascertained in accordance with the system of distribution which was then in operation.

There is no evidence in the present case that these owners did obtain this advantage, but upon the assumption that they did, the defendant in error could not by proof thereof have established a right to the same advantage. To hold otherwise would go counter to the principle determined by this Court in the case of *Pennsylvania Railroad Company vs. International Coal Mining Company*, 230 U. S., 184, that a shipper by proof of an illegal payment to a competitor does not thereby establish a right to secure for himself a like payment. So in the present case the defendant in error would not by proof that cars had been delivered to another shipper to which it was not entitled have established a right on its own part to cars to which it was not entitled. The measure of its right to cars was not the number that might have been delivered to some other shipper, but the proportion to which it was entitled as its fair share of the cars which the plaintiff in error had available for distribution. Of course, excessive deliveries to one shipper would deplete the number available for distribution among other shippers, and would consequently operate to their injury, but

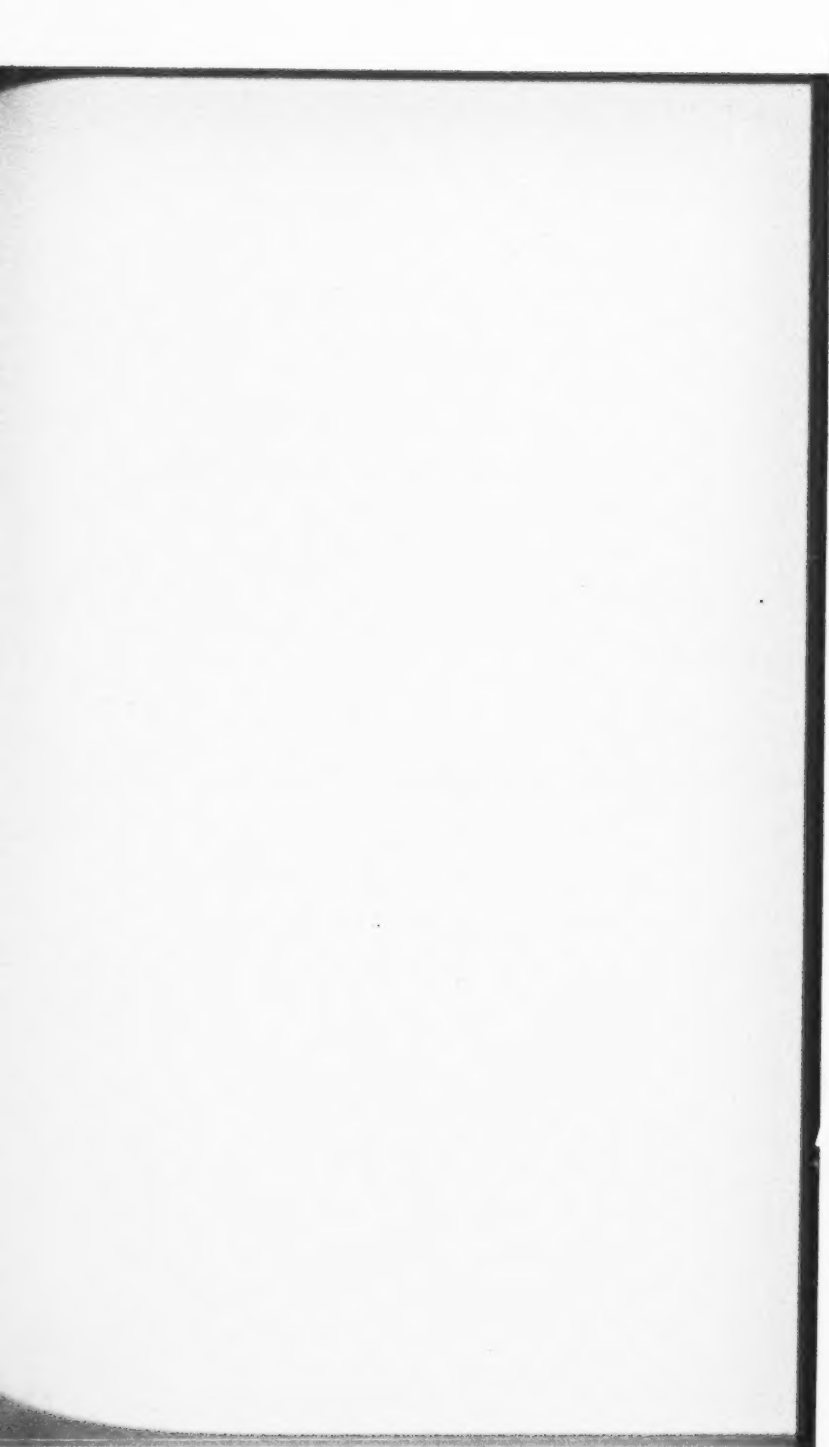
the injury to each one of these other shippers is to be measured not by the over-delivery made to the one, but by the proportion of the cars comprising this over-delivery which would have been available to each shipper.

In the present case the defendant in error admittedly got all the cars that it was justly entitled to. It now claims that it should have received more than its just due, and in support of this contention relies upon the fact that the plaintiff in error had established a regulation which, if carried out, would have given it the cars which it claims it should have received. But if this regulation was itself violative of other shippers' rights, how can it be used as a basis for determining the rights of the defendant in error? Assume for the sake of the argument that the plaintiff in error had entered into an express agreement with every shipper on its lines who owned private cars that it would deliver all of these cars to their respective owners and would not take them into account in determining the number of its own cars which should also be delivered, and that after these agreements had been entered into they had been declared illegal by a competent tribunal. Would any Court think for a moment of enforcing these agreements or of awarding damages because of the breach of them? And yet the case we have put is stronger than that which is presented in the present case, where no contractual obligation of the carrier, but only a practice, is relied upon in support of the claim.

We submit, therefore, that even upon the assumption that the trial Court and the Supreme Court of Pennsylvania had jurisdiction to entertain the action, judgment should have been entered therein in favor of the plaintiff in error.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,

For Plaintiff in Error.





No. 205

11

October Term, 1914.

IN THE

Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,

PLAINTIFF IN ERROR.

VS.

STINEMAN COAL MINING COMPANY.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.**

BRIEF OF DEFENDANT IN ERROR.

A. L. COLE,

A. M. LIVERIGHT,

For Defendant in Error.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914, NO. 289

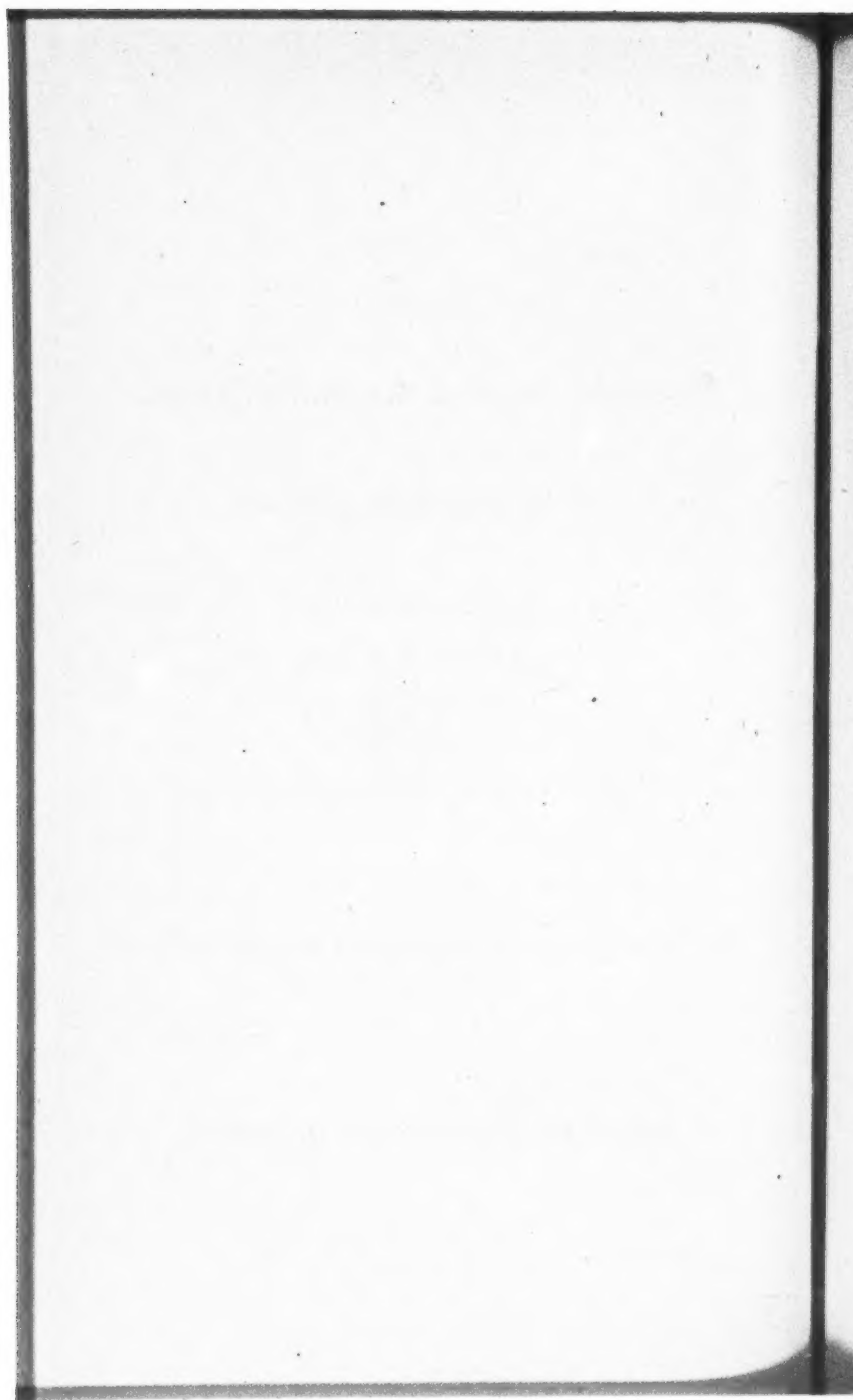
THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

STINEMAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.



COUNTER-STATEMENT OF THE CASE.

This is an action brought by the Stineman Coal Mining Company against the Pennsylvania Railroad Company for tortious discrimination in car supply by and through secret and special orders and other preferential devices accorded a competitor. The performance of those orders resulted in a large excess of cars to the competitor and a restriction of car supply as a consequence to the Coal Company. The period of the action is from April 1, 1902, to January 1, 1905, the location of the complaining operator was upon the Mountain Division of the carrier, between Altoona and Pittsburgh and the favored operator was the Berwind-White Coal Mining company.

Stineman Coal Mining Company operated a certain lease of its own, and as a contractor it loaded on the cars coal mined from an adjoining lease held by the Stineman Coal & Coke Company. The latter was an entirely independent corporation and had mines of its own, but for convenience it contracted with the Coal Company to load the coal of the particular lease over the improvements of the latter.

The Coal and Coke Company until November 1, 1903, had some assigned cars placed at the Coal Company's tipple in which to load the coal taken from the former's lease. The Coal Company had absolutely nothing to do with furnishing or demanding such cars, its only function with reference thereto being to fill them by contract out of the raw material of the Coal & Coke Company.

The Coal Company was absolutely dependent upon the system cars of the carrier for facilities in which to ship its own product and to take care of its own business. It had a large business of its own as a miner and shipper of coal, entirely independent of its contract with the Coal & Coke Company to put coal on the cars for the latter.

At the trial of the case as far as it went defendant-in-error offered substantially the same testimony as was offered by the coal company in the case of Puritan Coal Mining Company against the same carrier, which is now before this Court at number 76 October Term, 1914, on writ of error prosecuted by the Railroad Company. The trial had progressed for a day or two, when an agreement was reached between counsel by which the damages of the Stineman Coal Mining Company were liquidated at \$12,500, and a verdict was taken in that amount.

A separate and independent cause of action was included in plaintiff's amended statement, (Transcript of Record, page 17) therein designated as a "second and separate cause of action." This cause of action was abandoned before trial, and no evidence whatever was offered in support of it, nor was it in any way considered in connection with the trial of the case.

The verdict, however, was subject to a record stipulation reserving certain legal questions, to wit, the question of jurisdiction, and the effect upon the case of the practice of the carrier in its distribution of individual cars, together with the effect of rules prescribed by the Interstate Commerce Commission at a subsequent time, alleged by the Railroad Company to be controlling.

The reserved questions were decided in favor of the Coal Company, the trial court and the Supreme Court of Pennsylvania holding that the carrier's practice of distribution of individual cars was a matter foreign to the issue in the one aspect of the case, and that in any event the case was controlled by the practice in effect during the period of the action.

ARGUMENT.**THE CONTROLLING FACTS**

The controlling facts of this case make it plain that the individual car question had no bearing on the outcome, and could have none inasmuch as the defendant-in-error received no such cars *on its own account*. For a neighboring operator it loaded said operator's coal at a fixed price per ton, using in that behalf the improvements of it, the defendant-in-error. The neighboring operator was a corporation with an independent status in coal and railroad spheres. For convenience we will term it the Coke Company as distinguished from the Coal Company. The Coke Company caused Cornwall & Lebanon cars to be placed at the Coal Company's tipple in which to dump the product taken from ground by the former held under lease. This arrangement continued until November 1, 1903, when the Coke Company began using its own loading equipment.

To substantiate our assertions we take the following excerpts from the Transcript of Record:

Page 92.

- "Q. Now what became of the contract of the Stineman Brothers to load coal on the cars for the Stineman Coal & Coke Company?
- A. That was assumed by the Stineman Coal Mining Company on January 1st, 1901.
- Q. You say it was assumed. Was it carried out?
- A. Yes sir.
- Q. What kind of cars were loaded by the Stineman Coal Mining Company out of the coal owned or leased by the Stineman Coal & Coke Company?
- A. They were cars furnished by the Sterling Coal Company, *assigned to the Stineman*

Coal & Coke Company. The Stineman Coal Mining Company removed the coal from the lease of the Coal & Coke Company and was supposed to load it in the cars furnished by the Sterling Coal Company to the Stineman Coal and Coke Company.

- Q. *Did the Stineman Coal Mining Company have anything to do with obtaining the cars on which this coal was placed?*
- A. *The Stineman Coal Mining Company relied entirely upon the Pennsylvania Railroad system cars. No other source of supply.*
- Q. Answer the question please. Did the Stineman Coal Mining Company have anything to do with the arrangement or contract for the cars to be loaded for the Sterling Company?
- A. No sir.
- Q. Between what parties were those arrangements made?
- A. Between the Stineman Coal & Coke Company and the Sterling people.
- Q. *How did those cars come in?*
- A. *They were assigned to the Stineman Coal & Coke Company's mines.*
- Q. *By whom?*
- A. *By the Sterling Coal Company.*
- Q. Where was the Sterling Coal Company situated?
- A. Philadelphia.
- Q. What classes or characters of cars were these that were loaded for the Sterling Company?
- A. Cornwall & Lebanon cars.

Q. What was the arrangement between Stineman Coal Mining Company and the Stineman Coal & Coke Company with reference to the loading of these consigned cars?

* * * * *

A. The Stineman Coal Mining Company on the coal they mined from the lease of the Coal & Coke Company was loaded in the Sterling cars at a contract price.

* * * * *

Q. Did the Stineman Coal Mining Company have any interest whatever in the sale of the coal that was loaded in the C. & L. cars for the Coal & Coke Company?

A. Nothing at all.

* * * * *

Q. Did all the coal for loading of the C. & L. cars come out of coal territory not owned or leased by the Stineman Coal Mining Company?

A. It came from the lease of the Stineman Coal & Coke Company.

Pages 94 and 95.

Q. What was the rating of your mine?

A. 33 cars a day I believe.

* * * * *

Q. In the spring of 1903 what was its productive ability?

A. Practically about the same tonnage.

Q. 10 or 11,000?

A. Yes, 10 or 11,000 tons.

Q. Is that productive ability entirely apart from what was or could be produced on the Stineman Coal & Coke lease?

A. That is entirely apart from the Stineman Coal & Coke Company lease.

* * * * *

Q. What kind of cars did you load at the tipple there out of the *Coal Company's* lease?

A. *Pennsylvania cars when we got them.*

Q. *Is that what is known as system cars?*

A. Yes sir.

Q. State whether or not under the rules then in force by the railroad company private cars were counted against distribution?

* * * * *

A. I understood private cars were not counted against you. "distribution."

It thus becomes manifest that private cars had no place in the case, and constituted an absolutely collateral issue, the defendant-in-error having none of them, controlling none of them, and loading none of them except as above outlined for an independent corporation, out of a distinct and separate property and then only in the capacity of laborer.

So it is apparent that the individual car issue is a phantom, and the stipulation of counsel, apart from the jurisdictional question, has nothing to operate upon. This is peculiarly so, in view of the fact that the agreement of counsel is made dependent upon "the testimony that appears in this case."

To bear us out further we call particular attention to that testimony on page 92 (above quoted) that states unequivocally that the private cars were

"assigned to the Stineman Coal & Coke Company"

and that

"they were assigned to the Stineman Coal & Coke Company's mines."

We then invite attention to the phrasing of the Commerce Commission's order (Transcript of Record, page 64) on which plaintiff-in-error rests its case, as excerpted at pages 7 and 8 of its brief. It will appear at a

glance that the distribution rule relied on by the Railroad Company as a set-off concerns consigned or assigned cars, as they relate to the "*company to which such cars are consigned or leased,*" and as they relate to the "*lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars.*"

The only issue there was or could be concerned the allegations of unlawful discrimination, and after the testimony was fairly under way, John Scott, Jr., and George Scott having been on the stand (Transcript of Record, pages 111 to 114,) it grew apparent that there was no defense on the merits. Hence the verdict by agreement liquidating the damages.

B

CARRIER'S MISTAKEN LEGAL PROPOSITION

Taking up the technical features of the agreement of counsel, however, just as if the facts of the case warranted a discussion of the rules of distribution—and we feel that we have emphatically demonstrated the contrary—it is to be observed that it does not become a controversy as to whether a rule announced by the Interstate Commerce commission was reasonable or unreasonable. For the Commission had not, during the period of this action, announced the rule that the plaintiff-in-error now invokes. Neither is it a question whether the rule announced by the plaintiff-in-error itself, which was in force either by common consent and acceptance, or by promulgation during the period of the action, was fair or unfair. The real question is whether the defendant-below is *bound by its own rule*.

We contend that the principles announced by the Supreme Court of Pennsylvania in

Puritan Coal Mining Co. vs. Penna. R. R. Co.,
237 Pa., 420,

are the law, and we quote therefrom as follows:—

“The complaint that the Court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces *matter foreign to the issue in the case*. The issue had regard to the cars owned by the defendant company. The period of discrimination complained of antedated the decision in the cases of *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S., 452, where it was held to be the duty of the interstate carrier in making distribution of its cars in time of shortage to include in the computation private cars in addi-

tion to its own. In making distribution of its own cars, exclusive of those owned by private parties, the defendant was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears none made complaint. *Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction "*

The facts in the present case are identical, and that it has been made to appear that subsequently to the period of the action the Interstate Commerce Commission disapproved the Railroad Company's rule and declared the proper one to follow, we submit is immaterial.

The defendant-in-error accepted the rule that the Railroad Company said was in force during the period of the action, when it happened to be affected thereby, and now to permit the carrier to repudiate the rule and

to avoid a just judgment thereby, would be to permit it to *take advantage of its own wrong*, after it had reaped whatever benefit it could from the perpetration of said wrong.

The position of the plaintiff-in-error is aptly characterized in the opinion of the Pennsylvania Supreme Court (Transcript of Record, page 80) in the following language:

"The other defense set up by the defendant to defeat recovery is a little singular to say the least. By the stipulation filed of record by the parties it appears that by the method of distribution of cars among shippers adopted and practiced by the defendant during the period of this action individual cars were not charged against the distribution share of the mine. In violation of this system, discrimination in the distribution was practiced against the plaintiff and in favor of the Berwind-White Coal Mining Company as averred in the statement, resulting in damages to the plaintiff of the stipulated sum of twelve thousand five hundred dollars. The defendant now claims that it is not liable for this discrimination because its own rules of distribution were in violation of the present order or rules of the Interstate Commerce Commission by which the plaintiff's rating would have been charged with its individual cars, and the plaintiff company would then have received all the cars it was entitled to. In other words, the defendant concedes that it ignored its own rules and disregarded its own basis of distribution in furnishing cars to the plaintiff and discriminated against the latter and in favor of a competing shipper, but seeks to justify its unlawful conduct and injury to the plaintiff on the

ground that in making the distribution it had violated a subsequently promulgated order of the Interstate Commerce Commission. We have expressed our views on the merits of such a defense in the Puritan case in which the present defendant being also the defendant in that case unsuccessfully attempted under like circumstances to avoid liability for similar discriminatory acts on the same ground."

The Railroad Company's attitude is also defined in the vigorous language of the trial judge, in his opinion overruling the motion for judgment in favor of the plaintiff-in-error (Transcript of Record, page 76), as follows:—

"The Railroad Company saw fit during the period of the action of this case to adopt and carry into effect a rule of distribution excluding private cars from computation in charging against the individual shipper. It then proceeded to distribute its unassigned or system cars to the several shippers along its lines according to their rated capacity. This undoubtedly gave a great preference and advantage to the shipper owning individual cars. Having adopted it, however, can it now either in mitigation or as a complete offset to a claim for damages get immunity because of such apparent inequitable practice? To do so would put a premium on its own wrong-doing. It may well be assumed that the preferred shipper likewise used individual and assigned cars. The complaint sued for is distinctly against the practice of discrimination as to unassigned or system cars, as to which the verdict establishes the fact of such discrimination. Under the then prevailing practice of the

defendant company the plaintiff may have been forced to buy, lease or otherwise arrange for individual cars as a matter of self protection against the very discrimination alleged. If it could not get system cars, it may have been obliged to resort to individual cars to maintain its standing as a coal operator. To buy or lease cars meant an outlay of considerable money. To get individual cars from other operators, as is often done, and seems to be indicated by some of the testimony offered in this case, usually involves a sacrifice to some extent of the price to be received. As we look at it, therefore, the question of the individual cars used by the plaintiff does not enter into the issue involved in this case and certainly should not be used to deprive plaintiff of the damages agreed on as measuring the injury sustained by plaintiff because of its being deprived of its pro rata share of system cars."

THE AGREEMENT OF COUNSEL

The stipulation of counsel sets forth an agreement "that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars," judgment should be entered for defendant, n. o. v.

Under the practice individual cars were not charged against distributive share of any mine. Had it been stipulated that *notwithstanding* the practice the rules promulgated several years later by the Interstate Commerce Commission should govern, except for the considerations hereinbefore noted, there might possibly have been some slight plausibility in asking judgment for the carrier; but in the face of the language of the agreement, and its own practices, we respectfully contend that plaintiff-in-error has taken itself out of court.

Looking at the carrier's proposition from another viewpoint we find the Pennsylvania Railroad Company in the position of seeking, against a judgment founded upon a pure and simple tort, to set off another tort of which it admits it was guilty. It says, figuratively, true it is that I grievously wronged you in the distribution of system cars, but I also erred in my distribution of individual cars. *Ergo*, your judgment cannot stand. This is a novel application of the law of set-off. It had been our impression that a set-off was not assertable in an action of trespass, even though in morals it were a just counterclaim. *A fortiori*, must it be impossible to use a *tort as a set-off to a tort*.

The sophistries of the argument of the plaintiff-in-error are transparent. It first *assumes* that the Coal Company secured an undue advantage or preference through the system of distribution in force during the period of the action, and then insinuates that we try to hold the carrier accountable in damages for non-compliance with such system. All of this is pure invention as we have heretofore endeavored to show. The next

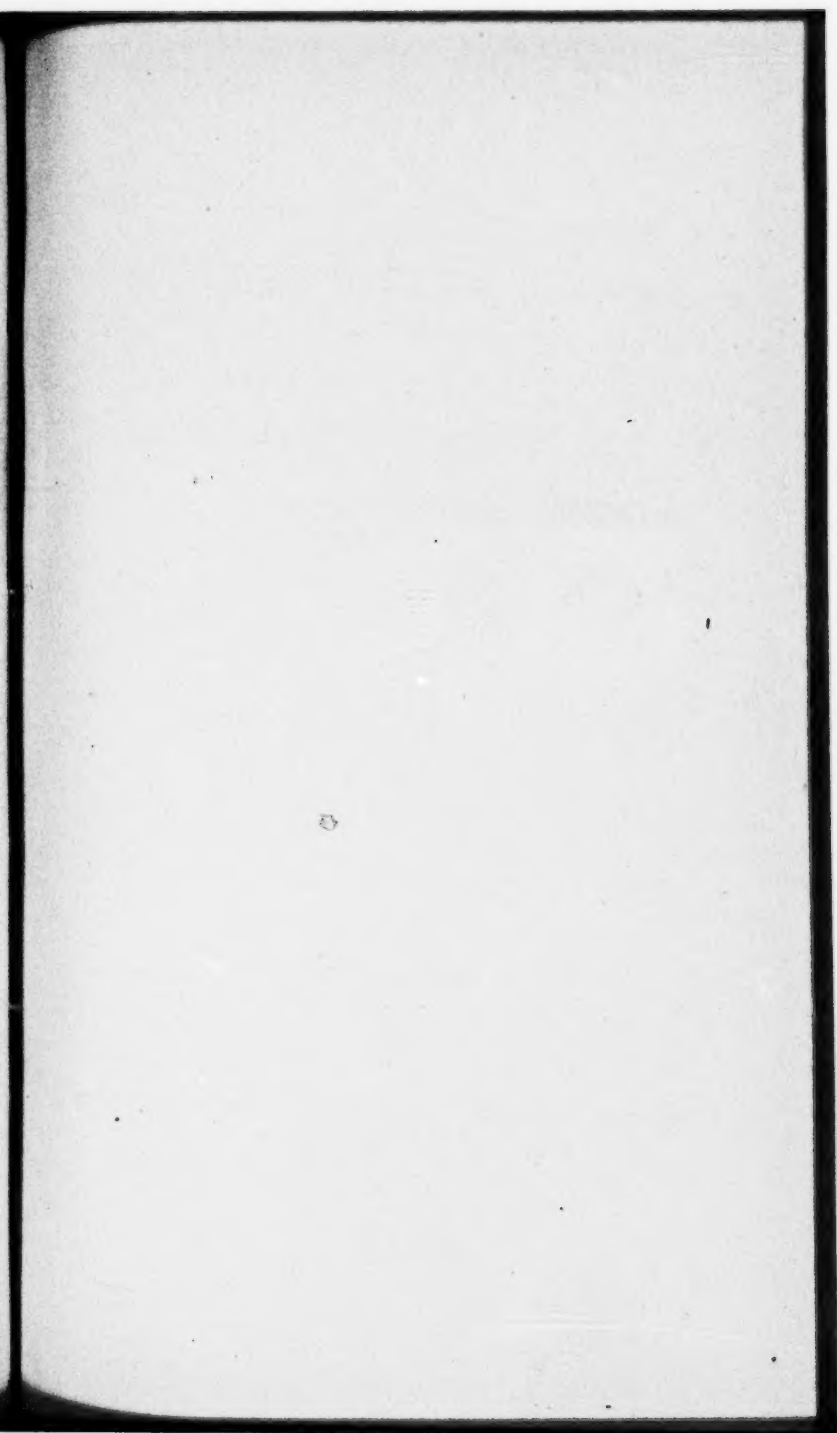
step takes the carrier easily and naturally to the point of suggesting that because another shipper had gotten cars to which it was not entitled the defendant-in-error should not recover on the basis of cars to which it was not entitled, citing *Pennsylvania Railroad Company vs. International Coal Mining Company*, 230 U. S., 184, in support.

The all-embracing answer to such absurdity is that no such measure of recovery was sought, allowed or even remotely considered. In the case at bar, the defendant-in-error did not admittedly get all the cars it was justly entitled to as suggested by counsel at page 14 of their brief. The contrary is true, and its recovery is measured as in the *Puritan* case, by its proportion of the over-delivery to favored competitors, said competitors operating substantially all the mines on the competitive division to which said excess cars were granted and distributed.

The jurisdictional question involved is similar to that in the *Puritan* case, in which it has been fully treated, and we shall not again inflict our views upon the Court.

We respectfully submit that the judgment should be affirmed.

A. L. COLE,
A. M. LIVERIGHT,
For Defendant in Error.



PENNSYLVANIA RAILROAD COMPANY v.
SONMAN SHAFT COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

No. 10. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 4, 1916.

The duty of a carrier to furnish cars for coal to be loaded at the mine and forwarded promptly for delivery to purchasers in other States is a duty in interstate commerce, notwithstanding the sale of the coal is f. o. b. at the mine.

If no administrative question is involved, a claim for damages for failure, upon reasonable request, to furnish to a shipper in interstate commerce cars sufficient to meet his needs may be enforced in a state as well as a federal court, and without preliminary finding by the Interstate Commerce Commission.

Such remedy is preserved by § 22 of the Interstate Commerce Act. The modes of redress provided by §§ 8 and 9 are not exclusive. *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121.

Where relevant conditions of trade and transportation are normal, it is the duty of the carrier, upon reasonable demand, to furnish a shipper in interstate commerce sufficient cars to satisfy the actual needs of his business. That duty, in this case, existed under the common law until the date of the Hepburn Act, and continued thereafter under a provision of that act which, so far as concerns this case, amounts to an adoption of the common law. Act of June 29, 1906, § 1, c. 3591, 34 Stat. 584.

242 U. S.

Opinion of the Court.

It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co. v. Puritan Coal Co.*, *supra*.

Evidence that throughout the period covered by alleged failures to supply cars, many cars of the carrier which otherwise would have been available to shippers on the carrier's lines were on the lines of other railroad companies as the result of through routings and joint rates, has no tendency to prove that the carrier supplied the complaining shipper with the cars to which he was entitled or to mitigate its default in that regard.

241 Pa. St. 487, affirmed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the briefs, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The coal company brought this action to recover damages from the railroad company upon two grounds, first, that for a period of four years, beginning April 1, 1903, the railroad company had failed to supply the coal company with a sufficient number of cars to meet the needs of the latter's coal mine; and, second, that during the same period the railroad company, in furnishing cars to the several mines in that district, had discriminated unjustly against the coal company and in favor of some of its competitors. The second ground was eliminated by the coal company at the trial and does not require further notice. The action was begun in a state court and resulted in a

judgment for the coal company for \$145,830.25, which the Supreme Court of the State affirmed. 241 Pa. St. 487.

The questions presented by the several assignments of error are: (1) What was the nature of the commerce involved? (2) If the commerce was interstate, was the action cognizable in a state court? (3) Was prejudicial error committed in excluding evidence presently to be mentioned?

The coal company sold its coal f. o. b. cars at the mine, and when the cars were loaded the coal was promptly forwarded to the purchasers at points within and without the State—largely to points in other States. This was well understood by both companies—by the coal company when it asked for cars and by the railroad company when it supplied them. Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation. While furnishing some cars for this service, the railroad company failed to furnish as many as the coal company needed and requested. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged. It was expressly so held in *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 465–468. We there said of the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other States: “The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce.” Here the state court ruled that, as the coal was sold f. o. b. at the mine, the commerce involved was intrastate, even though the coal was going to purchasers outside the State. This was error, but it plainly was without prejudice unless it led the state court to exercise a jurisdiction which it did not possess.

In the courts below the railroad company contended that, in so far as the commerce involved was interstate,

the action could not be entertained by a state court consistently with the Interstate Commerce Act, c. 104, 24 Stat. 379; and that contention is renewed here. It proceeds upon the theory, first, that the coal company was without any right to redress in respect of its interstate business unless the failure to supply it with the requisite cars was a violation of some provision of that act; second, that §§ 8 and 9 of the act prescribe the only modes of obtaining redress for violations of its provisions, and, third, that an action for damages in a state court is not among the modes prescribed.

It is true that §§ 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that §§ 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for § 22 contains this important provision: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in § 22 is to make it plain that such "appropriate common law or statutory remedies" as can be enforced consistently with the scheme and purpose of the act are not abrogated or

displaced, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446-447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, *ibid.* 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, *ibid.* 131-132; and that, if no administrative question be involved; as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act,¹ *ibid.* 132-135; *Eastern Ry. Co. v. Littlefield*, 237 U. S. 140, 143; *Illinois Central R. R. Co. v. Mulberry*

¹ "SEC. 1. . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, . . . ; and it shall be the duty of every carrier subject

Hill Coal Co., 238 U. S. 275, 283; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 472.

Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in § 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the

to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, . . . " c. 3591, 34 Stat. 584.

Commission either to the exclusion of the courts or as a necessary condition to judicial action.

But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the Commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133. Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of unforeseen car shortage it would be reasonable or otherwise was not then material.

Upon the trial the carrier offered to prove by a witness then under examination . . . "that during all of the period of this action the defendant had in effect . . . through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines

and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

But on the coal company's objection the evidence was excluded. We think the ruling was right. The offer did not point to any unusual or abnormal condition, not reasonably to have been foreseen, but, on the contrary, to a situation which was described as continuous throughout the four year period to which the action relates. It did not indicate that this condition was even peculiar to that period, or was caused by an extraordinary volume of coal traffic or an unusual detention of cars on other lines of railroad, or that it was other than a normal incident of the coal transportation in which the carrier was engaged. Without doubt the cars of this carrier when loaded with coal often went forward to destinations on the lines of other carriers. It is common knowledge that coal transportation has been conducted quite generally in this way for many years. Besides, a carrier extensively engaged in such transportation from mines along its lines, as this one was, naturally would expect to have a considerable number of cars on other lines in the ordinary course of business. Although possibly having a bearing upon the adequacy of the supply of cars provided by the carrier for the coal business as a whole,—a matter not within the contemplation of the offer,—it is certain that what was proposed to be proved had no tendency to show that the carrier had supplied to the coal company the number of cars to which it was entitled or to mitigate the carrier's default in that regard.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.*
STINEMAN COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

No. 11. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 18, 1916.

An action against an interstate carrier for damages caused by unfair and discriminatory departures from a rule of car distribution in times of car shortage may be prosecuted in a state court. *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, *ante*, 120.

The rule of car distribution relied on by the plaintiff having been held discriminatory and illegal by the Interstate Commerce Commission, in due proceedings, at the complaint of other shippers, and this being proven by reports and orders of the Commission produced in evidence, *held*, that the administrative question, so determined, could not be revived by the carrier to oust the jurisdiction of the court.

By such proceedings of the Commission the Act to Regulate Commerce intends no less to redress past discriminations than prevent them in future, under the carrier's rule, and this for the benefit of all shippers who have been or may be affected thereby; and when the Commission finds the rule obnoxious, not because of temporary or changeable conditions, but inherently and from its adoption, and, be-

sides ordering its discontinuance, recognizes that all injured shippers are entitled to reparation and awards it to such as appear and prove damages, the status of the rule is fixed for past as well as future transactions under it.

Where a rule is found discriminatory by the Commission in the circumstances indicated in the last preceding paragraph, a shipper, though not a party before the Commission, cannot recover from the carrier for its failures to obey the rule before the finding was made.

241 Pa. St. 509, reversed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the brief, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In a state court in Pennsylvania the coal company recovered a judgment against the railroad company for damages resulting, as was claimed, from unjust discrimination practiced in the distribution of coal cars in times of car shortage; and the Supreme Court of the State affirmed the judgment. 241 Pa. St. 509.

The suit related to both intrastate and interstate commerce, and whether, in respect of the latter, it could be brought in a state court consistently with the Interstate Commerce Act is the first question presented.

The coal company was engaged in coal mining on the carrier's line in Pennsylvania and was shipping the coal to points in that and other States. Other coal companies were engaged in like operations in the same district. A

rule of the carrier provided for a *pro rata* distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was, not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in *Pennsylvania R. R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 131-132, where the provisions of the Interstate Commerce Act were extensively considered: "There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." Adhering to this view, we think the suit was properly brought in a state court. See *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, *ante*, 120.

But it is suggested that in the course of the trial an administrative question—one which the act intends the Interstate Commerce Commission shall solve—was brought into the suit and that this disabled the court from proceeding to a decision upon the merits. The suggestion is grounded upon the fact that one of the carrier's defenses at the trial was to the effect that the rule invoked by the coal company as fixing its quota of the cars was unjustly discriminatory and therefore not an appropriate test of the shipper's right or the carrier's duty. We think the

suggestion is not well taken. The administrative question, which was whether the rule was reasonable or otherwise, was not then an open one. It had been theretofore determined in the mode contemplated by the act. Upon the complaint of other shippers, and after a full hearing, the Commission had found that the rule was unjustly discriminatory and had directed the carrier to give no further effect to it. See 19 I. C. C. 356, 392; 23 *ibid.* 186. This was shown by the reports and orders of the Commission, which were produced in evidence. Thus there was no jurisdictional obstacle at this point.

The Commission deemed it essential to a fair distribution in times of car shortage that individual cars, owned or controlled by the shipper, should be charged against his distributive share, and because the rule here took no account of such cars the Commission found that it was unjustly discriminatory. This occurred two years before the trial but after the period covered by the suit. As part of its defense the carrier claimed that the cars distributed to the coal company during that period included many individual cars controlled by the latter and that these were not charged against its distributive share. Evidently intending to recognize that this was so, and desiring to shorten the trial, the parties agreed that a verdict should be taken for the coal company in a designated sum, subject to the condition, among others, that, "if under the practice, the law and the rules," the court should conclude that "the plaintiff company should have been charged with individual cars," then judgment should be entered for the carrier *non obstante veredicto*. The verdict was taken and judgment entered thereon, the court concluding that the rule should be respected notwithstanding the Commission's finding. Complaint is made of this decision and we think it was wrong. That this shipper was not a party to the proceeding before the Commission hardly needs notice, no point being made of it in

the briefs. And it is not a valid objection that the finding came after the period to which the suit relates. The act contemplated that the proceeding should be conducted in the interest of all the shippers who had been, or were likely to be, affected by the rule, and not merely in the interest of those who filed the complaint. The purpose was to determine the character of the rule for the equal benefit of all, to the end not only that discrimination thereunder in the future might be prevented, but also that such discrimination in the past might be redressed. So understanding the act, the Commission, upon finding the rule unjustly discriminatory, ordered the carrier to cease giving effect to it and also recognized that shippers who had been injured through its operation in the past were entitled to reparation. And the Commission proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained. Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure. Only through an enforcement of the discriminatory rule, and of the particular feature which made it discriminatory, can a recovery be had. A right to recover independently of that is neither shown nor claimed. In short, the coal company concedes that it received all the cars to which it would have been entitled under a reasonable rule and yet seeks to recover

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upon the ground that more cars were not delivered to it under a rule which was unreasonable, because unduly discriminatory in its favor. Consistently with the act this cannot be done.

Judgment reversed.